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IN THE

Supreme Court of the United States

October Term, 1968

No. 513.

CORNELIA O'CONNOR GREY, JAMES CHARLES GREY and MICHAEL CARTER GREY,

Petitioners,

v.

FIRST NATIONAL BANK IN DALLAS in its private capacity and as trustee of the O'Connor and Morgan trusts and the Attorney General of Texas,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

FIRST NATIONAL BANK IN DALLAS in its private capacity and as trustee of the O'Connor and Morgan trusts and the Attorney General of Texas,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Cornelia O'Connor Grey, James C. Grey and Michael C. Grey, appellants in the proceeding below, pray that a writ of certiorari issue to review the judgment therein of the United States Court of Appeals for the Fifth Circuit.

Opinions Below

The opinion of the Court of Appeals is reported at 393 F. 2d 371, and is set out in Appendix A hereto, pp. 1a to 28a, *infra*. A petition for rehearing was denied without opinion. The trial was by jury under Rule 49(a), Fed. Rules Civ. Proc., before the United States District Court for the Southern District of Texas, Dallas Division, (Hon. Sarah T. Hughes) and that Court filed no opinion.

Jurisdiction

The judgment of the Court of Appeals, affirming the judgment of the District Court is dated March 21, 1968. Petitioners' timely petition for a rehearing filed April 11, 1968, was denied by order dated June 14, 1968, and pursuant to Rule 32 of the Rules of the Court below, its judgment issued as and for its mandate on June 25, 1968. The jurisdiction of this Court is invoked under Tit. 28 U.S.C. § 1254(1).[1] The jurisdiction of the District Court was based on diversity of citizenship.

Questions Presented

1—Whether in submitting special issues to a jury under Rule 49(a) of the Federal Rules of Civil Procedure, in an action by the three beneficiaries of a trust against their trustee for damages for the sale by the trustee to itself of a trust asset, on the ground that such beneficiaries' consent to such sale, and the subsequent approval of it by a state court, were induced by the trustee's misrepresentations, concealment or failure to disclose material facts, and on the further ground that the attorney purporting to represent the three beneficiaries in the state court proceeding was not authorized to represent two of them, an instruction that "Mrs. Grey was bound by the state court judgment and that James and Michael were likewise bound unless the jury found that they had not authorized Kelton to represent them", is tantamount to instructing a verdict for the trustee

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[1] The record in the Court of Appeals has been certified to this Court and will be cited as "R" preceded by the number of the printed volume, such as I R., II R., etc. The minutes of the state court hearing marked in the District Court as defendant's Exhibit 127, which was part of the record in the Court of Appeals but not printed and after denial of the motion for rehearing returned by the Clerk of the Court of Appeals to the attorneys for the Bank, will be cited as defendant's Exhibit 127.

on every issue determined by the state court judgment (except Kelton's representation of James and Michael), in the absence of any instruction that the state court judgment was not binding on any of the beneficiaries if the jury found that it was induced by the trustee's misrepresentations, concealment or failure to disclose one or more material facts. *Callen* v. *Pennsylvania R. Co.*, 332 U.S. 625.

2—Whether in submitting special issues to a jury under Rule 49(a) of the Federal Rules of Civil Procedure, in an action by the three beneficiaries of a trust against their trustee for damages for the sale by the trustee to itself of a trust asset, on the ground that such beneficiaries' consent to such sale, and the subsequent approval of it by a state court, were induced by the trustee's misrepresentations, concealment or failure to disclose material facts, Rule 49(a) of the Federal Rules of Civil Procedure requires the submission to the jury of a special issue in respect of the trustee's alleged failure to disclose material facts, notwithstanding the submission of a special issue in respect to the trustee's alleged misrepresentations and concealment of material facts and an instruction that a "trustee * * * has a duty to impart to the beneficiary all material facts in dealings between the trustee and the beneficiary", and whether a failure to submit such issue to the jury notwithstanding the beneficiaries' demand therefor, violated Rule 49(a) when there is substantial evidence of the trustee's failure to disclose material facts. *Tilman* v. *Great American Indemnity Co.*, 207 F. 2d 588 (7th Cir. 1953); *Palmiero* v. *Spada Distributing Co.*, 217 F. 2d 561 (9th Cir. 1954).

3—Whether, when an allegation of a complaint is admitted by the answer and by testimony on behalf of the defendant, the usual course of judical proceedings in federal courts requires that the jury be so advised in response to its inquiry during its deliberations as to whether there is any testimony in respect of such matter, where the

Court's attention is specifically drawn to such pleadings and testimony. *U.S.* v. *Jackson,* 257 F. 2d 41 (3rd Cir. 1959).

4—Whether when in the course of a pre-trial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure, the judge who later tried the case, after denying a motion to dismiss the complaint and concededly knowing the pleadings only, expressed the view that it was "improbable" that she would grant the equitable relief prayed for in the complaint, and that the plaintiff "just wants some money. I don't know what she wants with any more money. She's got all she can possibly use", exhibited such bias and prejudice as to preclude a fair trial, and whether in holding that a contention that the trial court had "prejudged" the case when it later ruled out all equitable claims, was "without merit", the Court below sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

5—Whether the due process requirements of the 14th Amendment are met, and a state court acquires personal jurisdiction over beneficiaries of a trust in an action to approve a sale by the trustee to itself of trust property, where there is no service of process, an attorney appearing on behalf of the trustee also purports to appear on behalf of such beneficiaries and such beneficiaries did not authorize such attorney to appear on their behalf and whether the motion of such beneficiaries in an action by them against the trustee for damages arising from such sale for a directed verdict or their motion, after an adverse verdict, for judgment notwithstanding the verdict, was required to be granted. *Armstrong* v. *Manzo,* 380 U.S. 545; *Griffin* v. *Griffin,* 327 U.S. 220; *Schroeder* v. *City of New York,* 371 U.S. 208; *Cooper* v. *Newell,* 173 U.S. 555.

Constitutional Provisions and Federal Rules Involved

1—14th Amendment to the Constitution of the United States, § 1, insofar as material, provides as follows:

> " * * * nor shall any state deprive any person of life, liberty or property, without due process of law, * * *."

2—Federal Rules of Civil Procedure, insofar as material, provide:

> "Rule 7 (a) *Pleadings.* There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer."
>
> "Rule 8 (d) *Effect of Failure to Deny.* * * * Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided."
>
> "Rule 15 (b) *Amendments to conform to the Evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. * * *"
>
> "Rule 49 (a) *Special Verdicts.* The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the

jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. * * *"

Statement

Petitioner Cornelia Grey ("Mrs. Grey") is the life tenant, and petitioners James and Michael Grey ("James" and "Michael"), her sons, are the remaindermen of a trust known as the O'Connor Trust of which respondent, First National Bank in Dallas (sometimes "the Bank") has been successor trustee since August 1954.

Prior to the end of December 1960, the O'Connor Trust, the Morgan Trust—a charitable trust—of which the Bank was and is also successor trustee, and Mrs. Grey individually were tenants in common of certain parcels of real estate in Dallas, Texas, including the A'Mell Building. Mrs. Grey's individual interests in such properties were also managed by the Bank as her agent (I R. 41, 176-177).

The A'Mell Building comprised 17,500 square feet of the 80,900 square feet contained in City Block 60, and was the largest of the twelve parcels in such block, save only the 25,000 square foot parcel owned by the Bank in its private capacity and occupied by its Motor Bank (V R. 78). The Bank's main building was located in a block facing Block 60 (V R. 122-123). On March 3, 1960, the Bank embarked on a program of acquiring the whole of Block 60 as the site of its contemplated new bank and office building and to that end had obtained letters of intent from the owners of five parcels by April 25, 1960, and received a sixth the following day (V R. 75-77; V R. 226-228; V R. 228-229; VII R. 737-740; VII R. 740-744; VII R. 745-748).

On April 25, 1960, the Bank first informed Mrs. Grey of its interest in acquiring the A'Mell Building, but nothing was said as to price (V R. 69, 70; I R. 62, 186). At the

same time, it was represented to Mrs. Grey that if the Bank could not acquire the entire Block 60, it would build its new building elsewhere (I R. 62, 186; V R. 69), although no other location was in fact being considered by the Bank (II R. 674, 675, 678, 894, 897). After having unsuccessfully attempted on May 11, 1960 to secure Mrs. Grey's consent to a sale of the A'Mell parcel at a price per square foot lower than the prices the Bank was prepared to pay for the other parcels in the Block 60 (I R. 62, 185-186; V R. 61), the Bank's negotiations with Mrs. Grey were resumed on September 13, 1960, and culminated on September 16, 19, 1960 in a written agreement between Mrs. Grey and the Bank for the sale of the A'Mell parcel to the Bank for $1,155,000, *i.e.* at $66 per square foot, to be effected by the partitioning of the A'Mell parcel at that valuation to the Morgan Trust, and of all the other properties held in common to Mrs. Grey individually and to the Bank as Trustee of the O'Connor Trust, as tenants in common (I R. 106-123). The Agreement provided that the Bank would purchase the A'Mell parcel from the Morgan Trust, and that the whole transaction was subject to the approval of the state court in a proceeding under Art. 7425-b, sections 12 and 24 E of Texas Rev. Civ. St.[2] Mr. Grey agreed to file an answer in such proceeding praying that the agreement be approved and that she would recommend to the remaindermen that they file similar answers. The agreement was signed for "approval and ratification" by James on September 19, 1960 and by Michael on October 5, 1960 (I R. 123).

On November 19, 1960, the Bank in its private capacity commenced the contemplated proceeding in the state court for the approval of the transaction, naming as defendants itself as Trustee of both the O'Connor and Morgan Trusts, Mrs. Grey, James and Michael and, because of the

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[2] The pertinent portions of these statutes are set forth in Appendix "B" hereto (pp. 1b to 3b).

charitable nature of the Morgan Trust, the Attorney General of Texas (VII R. 647-656). None of the Greys (petitioners here) was served with process, nor was any notice of the state court hearing given to James or Michael, even though the Bank was well aware of their addresses (VII R. 639-641). At the Bank's suggestion, and with the acquiescence of Mr. Dorsey, Mrs. Grey's then New York attorney, Mr. Kelton, a Dallas lawyer, who had been retained by the Bank to represent it as Trustee of the O'Connor Trust in such proceeding, appeared also for all of the petitioners herein, and filed a joint answer on behalf of the Bank as Trustee and of the petitioners herein, admitting all the allegations of the Bank's complaint and joining in the Bank's prayer, in its private capacity, for the approval of the proposed transaction (VII R. 656-8).

The proceeding was, as the Bank's General Counsel has described it, "a friendly suit", in which the Bank was "suing" itself (VII R. 641-3; II R. 793), and Mr. Kelton, who never consulted with Mrs. Grey, James or Michael, and knew nothing of the background of the matter other than what the Bank chose to tell him, was content to let the "facts" be developed at the hearing (held nine days after the filing of the complaint) by counsel for the Bank in its private capacity, which the latter did wholly by means of conclusions (IV R. 1772-1783; Def. Exh. 127). On the basis of such "facts", the Texas Attorney General gave his consent, and the court duly entered judgment as prayed for (III R. 1491-1492; I R. 124-137).

The partition was thus effected, and by deed dated December 30, 1960, the Bank as Trustee of the Morgan Trust conveyed the A'Mell parcel to itself in its private capacity (VII R. 706). Thereafter, Mrs. Grey had occasion to review the transaction and came to the conclusion that there was reason to believe that either the Bank had misrepresented certain facts to her, or had failed to disclose others to her, or both. Accordingly, her new New York attorneys wrote the Bank on April 28, 1961 that, on the basis of their pre-

liminary investigations, it was their opinion that the partition and sale agreement was invalid and unenforceable, and that the Bank would be acting at its sole risk and peril in dealing with the A'Mell Building (V R. 54). Nevertheless, the Bank thereafter demolished it and proceeded with the construction of its new bank and office building in part on its site.

Following the completion of an extensive investigation, on May 16, 1963, the petitioners commenced this action in the United States District Court for the Northern District of Texas, Dallas Division, in effect to set aside the state court judgment and to rescind the partition and sale agreement, or, in the alternative, for damages, on the ground that the Bank had misrepresented the material facts and had concealed or failed to disclose others, both in the negotiations leading to the agreement and in the state court proceeding, and further on the ground that the state court lacked jurisdiction of the person of both James and Michael (I R. 39-105). The Bank denied the allegations of the complaint and pleaded as one of its affirmative defenses that it had made "full disclosure" (I R. 176-224, 206-209). The District Court denied the Bank's motion to dismiss the complaint prior to the trial (I R. 151-155, 158), as well as its motion for a directed verdict against all the plaintiffs (the petitioners here) at the close of the plaintiffs' (the petitioners here) case (III R. 1470-1471). Nevertheless, in so doing, the District Court ruled *sua sponte*:

> "I would like to say, however, that I am not going to submit anything to the jury with reference to the State Court case except the question of authority of Mr. Kelton, and that really the effect of the submission that I have in mind is that I am affirming or saying that the partition and sale is approved as far as Mrs. Grey and the O'Connor Trust is concerned, and that the only thing that I am submitting to the jury is the issue of damages.
>
> I am not sure that I am making myself clear, but I think that there are two reasons why there are no grounds for setting aside the partition—one is that

I do not think that it would be equitable to do it, and the second is that it has been approved by the State Court, and that the O'Connor Trust and Mrs. Grey were represented, and the lawyers who represented them were authorized to act, so that I see nothing to submit to the jury as far as partition and sales agreement is concerned."

Now, do I make myself clear?" (III R. 1471)

In so ruling, the District Court made come true its earlier prediction, announced after the denial of the Bank's motion to dismiss the complaint, and when its knowledge was limited to the pleadings, that:

"The Court:

* * *

"I can't visualize myself setting aside this agreement and putting the property back in the names of Mrs. Grey and these Trusts. That just is inconceivable to me. It is also pretty inconceivable that I will set aside that judgment of the State Court. * * * Maybe the word 'inconceivable' isn't exactly the word I ought to be using because it is conceivable I might do it.

Mr. Stephens:

Improbable.

The Court:

It is improbable—yes—that I would."

* * *

"She [Mrs. Grey] doesn't want the property back, she just wants some money. I don't know what she wants with any more money. She's got all she can possibly use."[3] (IV R. 1809, I R. 33).

However that may be, consistently with her ruling (but inconsistently with her denial of the Bank's motion for a

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[3] Significantly, the remarks following the asterisks were deleted from the certified transcript of the pretrial conference, and were not incorporated therein until after a hearing on petitioners' motion to correct the record, which included the taking of the testimony of the court reporter, who finally released two typed pages containing the above quoted remark of the District Judge (I R. 27, 32-33).

directed verdict against Mrs. Grey), the District Court instructed the jury that:

> "Insofar as the State Court case is concerned Mrs. Grey, individually, and as a beneficiary of the O'Connor Trust, is bound by the Judgment approving the partition and sale of the properties here concerned. If you find by a preponderance of the evidence that Philip Kelton did not have authority to act for James C. or Michael C. Grey, they will not be bound by the State Court Judgment, and the partition and sale will not be effective as to them as Remaindermen of the O'Connor Trust, unless the entry of judgment was consented to by them or the partition and sale agreement was later ratified by them." (I R. 292).

In overruling petitioners' contention that such instruction improperly withheld from the jury the issue whether the state court judgment was induced by the Bank's misrepresentations, concealment or failure to disclose material facts, the Court below completely ignored the District Court's clearly expressed purpose to withhold such issue from the jury, saying, p. 16a, *infra*, 393 F. 2d at 382:

> "Finally, appellants claim that the court's instruction that Mrs. Grey was bound by the state court judgment and that James and Michael were likewise bound unless the jury found that they had not authorized Kelton to represent them was tantamount to instruct a verdict for First National on the issue of fraud and damage. Again we find no merit in this objection. The court's charge, taken as a whole, shows that the issue of the state court's jurisdiction was completely separate from the issue of whether First National fraudulently obtained that judgment. The distinction is also clear from the special interrogatories; Special Issue No. 1 went to Kelton's authority; Special Issues Nos. 2 and 3 to the alleged concealment or misrepresentation. We therefore see no basis for appellants' contention that the jury might have believed that if it answered 'yes' as to Kelton's authority, it was bound to answer 'no' as to fraud."

In relying for its conclusion on the submission to the jury of Special Issues 2 and 3,[4] the Court below failed to recognize that the judgment of the state court, which was received in evidence for all purposes except whether Kelton was authorized to appear for James and Michael (II R. 795, 796), expressly recited its findings (I R. 129), that the Bank had made a full and frank disclosure of all relevant facts known to it. Obviously, the submission to the jury of Special Issues 2 and 3 was in this circumstance wholly meaningless, for if, as the Court clearly instructed the jury, Mrs. Grey was "bound" by the state court judgment, and James and Michael were similarly "bound" by it if Kelton was authorized to appear for them, the jury had no choice but to return verdicts on Special Issues 2 and 3 in conformity with the state court judgment. The holding of the Court below that the instruction in question related only to the "jurisdiction" of the state court, and not to whether the findings recited in the state court judgment could be disregarded by the jury, finds no support in the District Court's charge, is belied by the trial judge's express ruling, and could not have been reasonably so understood by the jury. Certainly, there is nothing in the charge which expressly or even impliedly instructed the jury that the petitioners here would not be "bound" by the state court judgment if the jury found that it had been induced by misrepresentations, concealment or failure to disclose material facts (I R. 289-304).

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[4] *Special Issue No. 2*: "Do you find from a preponderence of the evidence that the First National Bank in furnishing information to Mrs. Grey, James Grey and Michael Grey leading to the partition and sale agreement of September 19, 1960 and the judgment of the state court of November 28, 1960 made any material misrepresentations?"

Special Issue No. 3: "Do you find from a preponderence of the evidence that the First National Bank in the negotiations with Mrs. Grey, James Grey and Michael Grey leading to the partition and sale agreement of September 19, 1960 and the judgment of the state court of November 28, 1960, concealed any material facts?" (I R. 297, 298).

The Court below affirmed the trial court's refusal to grant the motions of the petitioners here for a directed verdict, and for judgment notwithstanding the verdict, and concluded that, in any event, the petitioners herein were not "prejudiced" by such rulings (pp. 16a-17a, fn. 12, *infra*, 393 F. 2d at 382, fn. 12), because of the jury's negative responses on Special Issues 5 and 11.[5] But, here again, the Court below failed to perceive that the trial court's instruction quoted above, that "Mrs. Grey was bound by the state court judgment and that James and Michael were likewise bound unless the jury found that they had not authorized Kelton to represent them" (p. 16a, *infra*, 393 F. 2d at 382), permitted of no other verdicts on these issues. For, if the state court judgment was binding, there, as we have seen, were no "misrepresentations" or "concealment" on which damages could be predicated (I R. 129) and the judgment of the state court recited its conclusion that the price paid by the Bank for the A'Mell parcel was "fair" (I R. 130).

The Court below (pp. 14a-15a, *infra*, 393 F. 2d at 381), saw no inadequacy in the trial court's failure to include in its charge, notwithstanding the demand of the petitioners here in accordance with Rule 49(a) Fed. Rules Civ. Proc., a special issue with respect to the Bank's alleged failure to disclose material facts, in addition to those (Nos. 2 and 3) with respect to the Bank's alleged misrepresentations and concealments of material facts, though the issues of misrepresentations, concealments and failure to disclose material facts had been very extensively tried without any objections being interposed by the Bank to the admission of evidence of its failure to disclose. The Court below rested its conclusion on fragments of the trial court's

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[5] *Special Issue No. 5*: "Do you find from a preponderence of the evidence that Mrs. Grey, James C. Grey, or Michael C. Grey were damaged by such misrepresentations, if any, or concealments, if any?" (I R. 289-299).

Special Issue No. 11: "Do you find from a preponderence of the evidence that the A'Mell Building had a fair market value in excess of $1,155,000 on September 19, 1960?" (I R. 301).

charge to the effect that the Bank contended that "it made a full disclosure of all material facts", that a trustee "had a duty to impart to the beneficiary all material facts in dealings between the trustee and the beneficiary" and that, "there must be fair dealing and good faith by the Trustee toward the beneficiary." But, whatever these fragments from the Court's instructions may add up to, they are clearly no substitute for the submission to the jury of a special issue as to whether the Bank made a full disclosure of all material facts. Moreover, although a fiduciary's unintentional failure in good faith to disclose a material fact to his beneficiary is no less actionable than a misrepresentation or a concealment of a material fact in bad faith[6] the trial court's "good faith" instruction afforded the jury no basis for considering "concealment", which connotes bad faith[7] as encompassing failure to disclose.

The jury interrupted its deliberations to submit to the District Judge a written inquiry as follows:

> "Was their (sic) any testimony to indicate whether the bank told Mrs. Grey or her attorney that Mr. Majors owed the First National Bank $650,000.00 on the Republic Garage building." (I R. 362).

This inquiry related to a parcel in Block 60 acquired by the Bank, and went directly to the question of the accuracy of a crucial item in the schedule of prices paid by the Bank for parcels in that block, in reliance on which Mrs. Grey agreed to the price specified for the A'Mell parcel in the partition and sale agreement (I R. 138-140).

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[6] This is elementary under Texas Law. *Langford* v. *Shamburger*, 417 S.W. 2d 438 (Tex. Civ. App. 1967); *Murphy* v. *Carthwright*, 202 F. 2d 71 (5th Cir. 1953) on appeal from U.S. District Court for the Western District of Texas.

[7] *Bates* v. *Prebble*, 151 U.S. 149, 159-163, *Wood* v. *Carpenter*, 101 U.S. 135, 143; *Service Life Ins. Co.* v. *Weinberg*, 81 F. 2d 359, 361 (7th Cir. 1936) 3 Pomeroy's Equity Jurisprudence (5th Ed.) Section 900.

Although the trial court's attention was promptly called to the circumstance that it was admitted by the Bank in its answer that it had not made disclosure to Mrs. Grey or her attorney of Majors' indebtedness to it secured by the Republic Garage Building (I R. 363, 64, 65, 67, 190), and that the Bank's president and senior vice president had, as witnesses for the Bank, confirmed such admission (II R. 499, 505; III R. 1016), the judge declined to answer the jury's inquiry informing them only that "The Jury is the exclusive judge of the evidence" (I R. 364). Nevertheless, the Court below, in holding that the District Court's reply was "an appropriate one", strangely said (p. 24a, *infra*, 393 F. 2d at 386):

> "• • • In order to answer the question on the merits, the judge would have had to review over 2,000 pages of transcript and 400 exhibits and, in the absence of direct testimony, draw an inference as to the proper answer. This would have been an insurmountable burden. As an alternative, the judge could simply have tried to recall the evidence and evaluate its significance, but in so doing she would have been acting as a 13th juror."

Obviously, the Court below was thinking of some other case.

In regard to the issue whether Kelton was authorized to appear for James and Michael in the state court proceeding, the Court below said, in affirming the judgment of the District Court (p. 21a, *infra*, 393 F. 2d 385):

> "James was personally present and actively participated in the September negotiations in Dallas; at that time Dorsey purported to speak for 'Mrs. Grey and her sons' and James did not deny his authority to do so. Michael testified that he left the management of his interest to his mother and never disagreed with her about such matters. Mrs. Grey told Dorsey (in front of James) to direct all correspondence about the Partition and Sale Agreement to her and 'she would take it up with the boys.'

> Indeed, the letter Dorsey wrote Mrs. Grey in November 1960 saying that he had authorized Kelton to represent her and her sons reached her in Paris where she was staying with both of her sons. Thus the jury could reasonably have found that the Dallas transaction was a family affair, that the mother spoke for the family, and that Dorsey was the family attorney protecting the family interests."

But the partition and sale agreement (I R. 106, 116), in expressly providing that "Mrs. Grey will recommend to the Remaindermen that they file an answer in such proceeding containing a similar prayer", *i.e.*, joining in the prayer for relief contained in the complaint, clearly negates any possibility of an inference that the "mother" spoke for "the family", *i.e.*, that Mrs. Grey was authorized to act for James and Michael. Moreover, while she received Dorsey's letter to which the Court below refers, she never mentioned the matter to James or Michael (III R. 1281-1284), neither of whom was aware of Kelton's purported representation of them, or, indeed, of Kelton's very existence (II R. 517, 518, 564, 565; III R. 1461).

Nor is the Court below on any more solid ground in regard to Dorsey's being "the family attorney protecting the family interest". "The family", as such, had no interest, although each of the three members of the family had his own interest in the matter. Indeed, while Dorsey first testified that he "assumed" that he represented James and Michael, he later explained that "I should not have used the word 'assumed'. I was representing James and Michael at that time in another matter" (III R. 1246). Obviously, Dorsey's representation of James and Michael in "another matter" gave him no authority to authorize Kelton to act for them in this one.

Moreover, the Court below distorts the record when it says, in an attempt to lay a foundation for its conclusion that Dorsey was James' lawyer in the matter (p. 21a, *infra*, 393 F. 2d 385), that during the September negotiations,

"Dorsey purported to speak 'for Mrs. Grey and her sons' and James did not deny his authority to do so" and that while flying from Dallas to New York after the conclusion of the partition and sale agreement, "Dorsey explained the various provisions of the agreement first to Mrs. Grey and then to James". However, there is no testimony in the record that James ever heard Dorsey stating that he was speaking for him and his brother, so that there was no occasion for James to deny it. Similarly, Dorsey's testimony is explicit that he went over the agreement on the plane with Mrs. Grey, but that James was not "seated or situated in such a manner that he could hear or overhear the conversation between Dorsey and Mrs. Grey (III R. 1232-1234). There is no testimony in the record that Dorsey explained the agreement to James then or at any other time. The Court below also distorts the record when, as a basis for its conclusion that there was sufficient evidence for the jury to have based its verdict in this regard on Mrs. Grey's authority to act for Michael, and says, p. 21a, *infra*, 393 F. 2d 385, that "Michael testified that he left the management of his interest to his mother and never disagreed with her about such matters." On the contrary, Michael testified (II R. 521):

> "Q. So, now getting to the property in question, you had known all of your life that your brother and you had valuable interests in Dallas, haven't you? A. No, sir, I did not.
>
> Q. Didn't your mother explain to you, sir, and your brother, many times that she only got the income from this property in Dallas, and on her death it was yours, sir?
>
> * * *
>
> A. She explained that she had properties in Dallas. My understanding from her explanation was, one day we didn't have much, she so worded it. My mother wanted us to believe that we had to go and earn our own money rather than wait for an inheritance.
>
> * * *

Q. Is it true, sir, that from the beginning of time you had never disagreed with your mother about the handling of the Dallas property? A. I never argued with her about it. She never talked much about it—I never talked with her much about it.

Q. Have you ever disagreed with her, sir?

* * *

A. Not to my recollection, sir.

Q. What have you argued with her about the Dallas property? A. I haven't argued anything about it.

Q. Well, you have been in complete accord with her, then, is that it? A. Well, I never discussed Dallas matters with her, sir.

Q. Then, you have never mentioned it one way or the other from the beginning of time up until now, is that what you mean?

* * *

A. Yes, sir, that's what I mean." (II R. 575-6)

It follows that the conclusion of the Court below on this issue is not only wholly unsupported, but contrary to record facts and rests on one insupportable inference drawn from another.

The Court below, moreover, utterly failed to draw the proper conclusion of law from the circumstance expressly noted by it, p. 9a, *infra*, 393 F. 2d at 378 that in the state court proceeding there was, unavoidably, a basic conflict of interest between the Bank as trustee and James and Michael as remaindermen of the trust, which necessarily disqualified Kelton from representing both the Bank and the remaindermen. Clearly, where such an obvious conflict of interest exists, an attorney—client relationship, contrary to public policy, is not to be inferred on such grounds as the Court below advances. Indeed, as hereinafter demonstrated at p. 32, *infra*, even express employment of a lawyer in such circumstances does not suffice to vest him with an attorney's usual authority, since he is disqualified to exercise it.

REASONS FOR GRANTING THE WRIT

I

Whether the charge to the jury that "Mrs. Grey was bound by the state court judgment and that James and Michael were likewise bound unless the jury found that they had not authorized Kelton to represent them" was tantamount to instructing a verdict for the trustee on every issue determined by the state court judgment other than Kelton's representation of James and Michael, is a federal question which the court below decided in a way in conflict with this Court's decision in *Callen* v. *Pennsylvania R. Co.*, 332 U.S. 625.

The Court below held that the Trial court was required to submit to the jury the issue as to whether the judgment of the state court had been obtained by respondent Bank's fraud (infra, p. 12a, 393 F. 2d at 380).[8] Nevertheless, the Court below found no reversible error in the instruction given to the jury by the trial court that "Mrs. Grey was bound by the state court judgment and that James and Michael Grey were likewise bound by it unless the jury found that they had not authorized attorney Kelton to represent them in the state court," *infra*, p. 16a, 393 F. 2d at 382.

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[8] The record of the State Court hearing is clear that Mrs. Grey and James were prevented by the Bank's failure to disclose facts bearing upon the proposed purchase by it of trust property and upon the sales price thereof from knowing of the defenses they could have interposed at the state court hearing, and that Michael did not even know of his rights and received no information whatsoever relating to the proposed transaction and that none of such facts were revealed to the Attorney General of Texas or to the state court itself. These facts clearly constituted extrinsic fraud invalidating a judgment under the doctrine of *U.S.* v. *Throckmorton*, 98 U.S. 61. Moreover, they constituted fraud upon the state court itself. *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U.S. 238.

In rejecting petitioners' assignment of error that such instruction withdrew from the jury all the issues of fraud and damage and left for the jury's determination only the issue of Kelton's authority, the Court below reasoned, p. 16a, *infra*, 393 F. 2d at 382, that the charge, taken as a whole, treated the issue of the state court jurisdiction separately from the issue of fraud in obtaining the judgment and submitted to the jury separate special interrogatories on such issues.

In so holding, the Court below disregarded the decision of this Court in *Callen* v. *Pennsylvania R. Co.*, 332 U.S. 625, and misapplied Rule 49(a) of the Federal Rules of Civil Procedure.

Indeed, viewed from the standpoint of the jury, as it must be, the instruction that Mrs. Grey was "bound" by the state court judgment and that the remaindermen were likewise so "bound", if Kelton had authority to represent them, necessarily meant that the plaintiffs (petitioners here) had no right to challenge, or make any contention contrary to, any of the recitals in the state court judgment except those relating to Kelton's representation of James and Michael. That judgment, read to the jury in its entirety (I R. 124) recited as findings that the Bank "has made a full and frank disclosure of all relevant facts known to [the Bank] touching the value of the [A'Mell Building] and all other circumstances known to [the Bank] bearing on the fairness of the partition and sale" (I R. 129) and that the sale of the A'Mell Building to the Bank for $1,155,000 was fair and equitable and in the best interests of the Morgan and O'Connor Trust (I R. 130-131).

Hence, the Trial Court's instruction left no alternative to the jury but to answer in the negative all the special issues relating to misrepresentations, concealment, damages resulting from misrepresentation or concealment, if any, the fairness and equitable nature of the agreement in suit and the market value of the A'Mell Building (Special Issues Nos. 2, 3, 5, 7, 10 and 11, I R. 299-301). Clearly, no jury could have understood the Trial Court's instruction

as merely referring, as the Court below asserts, to the question of the state court's personal jurisdiction over Mrs. Grey and her sons. The charge to the jury may be searched in vain for any explanation or even intimation that in stating that Mrs. Grey and her sons were bound by the state court judgment, the Trial Court meant that they could not be so bound if the jury found that such judgment had been obtained by fraud.[9]

The decision of the Court below is, accordingly, in conflict with the decision of this Court in *Callen, supra.* There, the defendant railroad pleaded as a defense in an employee's personal injuries action a release executed by him. Although the issues as to the permanency of his injuries and as to whether the release was induced by the mutual belief that the injuries had no permanent effect were sharply controverted, the trial judge instructed the jury that both sides had agreed that the release was not in contemplation of permanent injuries and, therefore, was not binding, except to the extent of $250 paid in consideration thereof. Even though the trial judge—unlike the District Court here—made an effort later in the charge to correct these errors, by instructing the jury that the release would be binding if it found that the employee had been aware of the permanent nature of his injuries or if the release was based in part on the question of liability

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[9] It is obvious that in an action such as here to set aside a judgment for extrinsic fraud, the plea of res judicata is not available. This principle is well settled under Texas Law, which is controlling here under *Erie, Brammer & Wilder* v. *Limestone County,* 24 S.W. 2d, 99, 105 (Tex. Civ. App. 1929); *Re Garcia* v. *San Antonio & A. P. Ry. Co.,* 77 S.W. 275 (Tex. Civ. App. 1903, writ ref.). The same principle is followed by Federal courts. *Earll* v. *Picken,* 113 F. 2d 150, 158 (C.A.D.C. 1940); *Grummons* v. *Zollinger,* 240 F. Supp. 63, 75, aff'd 341 F. 2d 464 (7th Cir. 1965); *Dana* v. *Morgan,* 232 F. 2d 85, 89 (2nd Cir. 1916); *Liken* v. *Shaffer,* 64 F. Supp. 432, 444 (D.C. Iowa 1946); *United States* v. *Jerome,* 115 F. Supp. 818, 821 (D.C.S.D. N.Y. 1953).

and that the issue of permanency of the injuries should be determined by the jury, the Court of Appeals for the 3rd Circuit, observing that in attempting to correct his erroneous instructions, the trial judge had failed to tell the jury on his own motion that clear and convincing evidence of mutual mistake of a material fact was required to void the release, reversed the judgment in favor of the employee on the ground that the instruction as to the non-binding effect of the release improperly withdrew from the jury the controverted issue of fact of the validity of the release and predetermined the issue as to the nature of the injuries, 162 F. 2d 832.

In affirming the decision of the Court of Appeals this Court said, 332 U.S. 628-9:

> "The Circuit Court of Appeals, quite rightly we think, construed the charge of the District Judge as withdrawing the question of validity of the release from the jury and said: 'This was palpable error under the facts relating to the release and entirely aside from the Court's incorrect assumption that there was no dispute about the permanency of the injuries.'
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> * * *
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> "It is apparent that the jury accepted the instructions of the court on the subject of the release. Returning, they rendered a verdict 'for the plaintiff, and assessed the damages at $25,240.00, of which the Railroad is to be reimbursed with $250.00.' * * * Under the instructions they had received, there was little else that the jury could do, for the court had withdrawn from them the issue as to the validity of the release and consequently had given them no instructions as to the law that should govern the determination of any such question."

The Court below, by emphasizing that the charge should be taken "as a whole" proceeded on the theory that what-

ever may have been the jury's understanding of the instruction that Mrs. Grey was "bound" by the State court judgment and James and Michael "bound" by it subject to the determination of the issue of Kelton's authority, the submission of the jury of a special issue as to misrepresentations or concealments "leading" to the state court judgment enabled the jury to freely arrive at a verdict on that issue. Such a theory misapplies the principle that an erroneous instruction may be rendered harmless by another correct instruction in the charge, by assimilating a correct special issue submitted to the jury under Rule 49(a) of the Federal Rules of Civil Procedure to a corrective instruction. Indeed, under Rule 49(a), an erroneous instruction necessarily governs the jury's answer to the special issue and, therefore, far from being rendered harmless, pervades the jury's verdict. Rule 49(a) provides that the court shall "give to the jury such explanations and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue." Here, the District Court expressly stated in its charge that the jury was required "to answer the * * * special issues *in accordance* with the instructions * * *" (I R. 297) (emphasis supplied).

In view of the conflict of the decision of the Court below with the decision of this Court in *Callen* and in view of the widespread use of special verdicts under Rule 49(a) Fed. Rules of Civil Proc. in several circuits, it is important in the proper administration of justice in Federal courts that this Court, which has not had an occasion to do so, makes it clear that under Rule 49(a) an erroneous instruction is not rendered harmless by the submission of a proper special issue, but, on the contrary, that an erroneous instruction necessarily governs or at least affects the jury's answer to the special issue.

II

The refusal of the trial judge to submit to the jury under Rule 49(a) Fed. Rules Civ. Proc. a special issue as to the trustee's failure to disclose to the beneficiaries and to the state court material facts relating to the sale by the trustee to itself of trust property approved by the state court, separately from special issues as to the trustee's misrepresentations and concealment, where the issue of failure to disclose was raised by the trustee's pleadings and supported by substantial evidence received without objections, is an important federal question which has not been, but should be settled by this Court and which the court below decided in a way in conflict with decisions of other courts of appeals.

As shown above in the "Statement", pp. 13 & 14, *supra*, the Court below, in overruling petitioners' assignment of error relating to the refusal of the District Court to submit to the jury, as requested by petitioners, a special issue as to the Bank's failure to disclose material facts in addition to the special issues as to misrepresentations and concealment, held that the District Court's charge "considered as a whole * * * did charge the jury that at issue was [the Bank's] failure to disclose", pp. 14a-15a, *infra*, 393 F. 2d at 381 and that the petitioners could not complain of the omission of a separate issue of failure to disclose because in their complaint they had not always clearly distinguished concealment from failure to disclose, p. 15a, *infra*, 393 F. 2d at 381-382.

The first reason given by the Court below is again predicated upon a confusion between instructions to the jury and the special issues submitted to it under Rule 49(a) of Federal Rules of Civil Procedure. Even if the instructions to the jury as to that issue were correct—and as shown above, p. 14, *supra*, they were not in view of the erroneous injection of the element of the trustee's good

faith in its dealings with the beneficiaries, they could not cure the omission of a special issue expressly requested by the petitioners (I R. 349), since a correct instruction no more enables the jury to determine an omitted special issue than a proper special issue renders harmless an erroneous instruction.

The holding of the Court below on that point is in conflict with the decisions of the Court of Appeals for the Seventh Circuit in *Tilman* v. *Great American Indemnity Co. of New York*, 207 Fed. 2d 588 and in *Mickey* v. *Tremco Mfg. Co.*, 226 F. 2d 956 and for the Ninth Circuit in *Palmiero* v. *Spada Distributing Co.*, 217 F. 2d 561, where it was held in accordance with Rule 49(a) Fed. Rules Civ. Proc.[10] that when a trial court submits to the jury special verdicts, all material factual issues should be covered by the questions submitted.[11]

In predicating in part its holding on the wording of the complaint, which charged the Bank with deliberate withholding of material facts in bad faith, and, therefore, alleged concealment, the Court below disregarded the fact that the Bank's affirmative defense of full disclosure of all the material facts (I R. 206-209) raised the issue of nondisclosure in addition to the issue of concealment. Indeed under Rule 8(d) of Federal Rules of Civil Procedure, any averment in the pleading "to which no responsive pleading is required or permitted" is deemed denied, and under Rule 7(a) no responsive pleading was permitted to the Bank's affirmative defense.

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[10] Rule 49(a) insofar as material, provides: "If * * * the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted *unless before the jury retires he demands its submission to the jury.*" (Emphasis supplied.)

[11] The *Tilman* case was quoted with approval by another panel of the Fifth Circuit in *Angelina Casualty Co.* v. *Bluit*, 235 F. 2d 764, 777.

The Court below also disregarded the amendment of the complaint during trial which the District Judge directed the petitioners to file notwithstanding Rule 8(d) (III R. 1031-2), in which petitioners alleged "Bank's failure to apprise any plaintiff [the petitioners here] of factual knowledge within the Bank's possession concerning development plans for City Block 232 [the block across the street from Block 60]" (I R. 149).

Moreover, the Bank's own officers admitted at the trial —without any objection being interposed—failure to disclose certain facts, claiming that such failure was unintentional (I R. 473, II R. 510, 672, 680, 883, III R. 1016, 1026, 1027, 1032-1033), which under Rule 15(b) Fed. Rules Civ. Proc. resulted in the complaint being deemed amended.

It follows that the issue of non-disclosure as distinguished from misrepresentations and concealment, was raised by the pleadings and the evidence and, accordingly, was required by Rule 49(a) Fed Rules Civ. Proc. to be submitted to the jury.

In view of the conflict between the decision below and the decisions of the Courts of Appeals for the 7th and 9th Circuits and the frequent use of special verdicts, this important question of Federal procedure, which has not been passed upon by this Court, should be determined by it.

III

Whether, where a jury's inquiry to the trial judge relates to the existence *vel non* of testimony in regard to a fact which is the subject of a judicial admission, the trial judge is required to so advise the jury, is an important question of federal procedure which has not been, but should be settled by this Court and which the court below decided in a way in conflict with decisions of other courts of appeals.

As shown above, pp. 14-15, *supra*, the jury's inquiry made during its deliberations, related to the existence of

any testimony in regard to a fact which had been admitted in the Bank's answer and by the Bank's president and senior vice-president at the trial. Nevertheless, and although such admissions were specifically called to the District Judge's attention, she refused to so advise the jury and instead answered its inquiry by stating that it was the sole judge of the evidence, thus implying that there was some testimony the significance and credibility of which was to be determined by the jury (*supra*, p. 15). In upholding the District Court's action, the Court below, disregarding the record, predicated its decision on the "unsurmountable burden" for the trial judge to review over 2,000 pages of transcript and 400 exhibits and the impropriety for the trial judge trying to recall the evidence, p. 24a, *infra*, 393 F. 2d at 386.

The question therefore is as to whether a trial judge is required, in answer to the jury's inquiry, to advise it that there is no dispute as to the fact inquired about, especially when such fact, as here, is of vital importance for the determination of the case and the judicial admission of such fact is specifically called to the judge's attention.

The Court of Appeals for the Third Circuit held in *U.S.* v. *Jackson*, 257 F. 2d 41, 43, that though usually the question of whether the jury's inquiry as to factual matters should be answered rests in the discretion of the Court, a party (there, the defendant in a criminal case), is entitled to have the jury informed as a matter of right when the jury's inquiry relates to a highly material fact not in dispute.

The holding in *Jackson* was followed by the Court of Appeals for the Seventh Circuit in *U.S.* v. *Fiorito*, 300 F. 2d 424, 426-427 and by the Court of Appeals for the Eighth Circuit in *Gregory* v. *U.S.*, 365 Fed. 2d 203, 206.

A similar doctrine has been adopted in civil matters by the highest state courts, and in particular by the highest courts of Wisconsin in *Knipfer* v. *Shaw*, 210 Wis. 617, 624, 246 N.W. 328; of South Dakota in *Wittmeier* v. *Post*, 105

N.W. 2d 67, 70; of West Virginia in *Nixon* v. *Shaver*, 115 W.Va. 49, 175, S.E. 849; of Kentucky in *Milward* v. *Luigart*, 41 S.W. 568, 569 and of New York in *Kerner* v. *Surface Transp. Corp.*, 266 App. Div. 356, aff'd 293 N.Y. 881.

The question whether such doctrine should be applied in Federal courts in civil cases has not been, but, we respectfully submit, should be resolved by this Court in view of its importance for the proper conduct of jury trials in Federal courts and of the conflict between the decision of the Court below and the decisions of the Courts of Appeals for the Third, Seventh and Eighth Circuits.

IV

In affirming the judgment of the District Court below, notwithstanding the trial judge's petulant expression of her bias and prejudice against Mrs. Grey, as well as the trial judge's predetermination of crucial issues in the case without any knowledge of the evidence, the court below has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The remarks of the trial judge are quoted at p. 10, *supra*. Petitioners believe that the matter speaks for itself and calls for no elaboration.

V

Whether the due process requirements of the 14th Amendment are met and a state court acquires jurisdiction over beneficiaries of a trust in an action to approve the sale by trustee to itself of trust property when there is no service of process, and an attorney appearing on behalf of the trustee purports also to appear on behalf of such beneficiaries is a federal question which has not been, but should be settled by this Court.

The Court below predicated its holding that James and Michael had not been denied state due process, notwithstanding the undisputed fact that neither of them was served with process in the state court proceeding (VII R. 639, 641), upon the special verdict of the jury that Kelton had been authorized to appear for them in that action, pp. 17a-22a, *infra*, 393 F. 2d at 384-385 and on the further ground that the notice requirements of section 24E of the Texas Trust Act, Art. 7425-b Tex. Rev. Civ. Stat.[12] were satisfied by the provisions of the partition and sale agreement that it was conditioned upon the entry of a judgment in a proceeding in the State Court to be commenced as soon as possible, p. 19a, fn. 16, *infra*, 393 F. 2d at 384 fn. 16.

The second ground formulated by the Court below is untenable, since even apart from the prohibition by art. 2224 Tex. Rev. Civ. Stat. of waiver of process or authorization of an appearance by the contract sued on,[13] and the provisions of subdivision D of § 24 of the Texas Trust Act, art. 7425b Tex. Rev. Civ. Stat. which applies to any proceedings under said Act the statutes and rules governing service of process,[14] it is obvious that the agreement here, which contemplated the commencement of an action in the

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[12] "A court of competent jurisdiction may * * * for cause shown and upon notice to the beneficiaries, relieve a trustee from any or all of the * * * limitations and restrictions which would otherwise be placed upon him by this Act."

[13] "No acceptance of service and waiver of process, nor entry of appearance in open court * * * shall be authorized by the contract * * * sued on, * * * nor shall such acceptance or waiver be made until after suit brought."

[14] "Except as otherwise provided herein, the provisions of the statutes and rules of court governing such procedure, commencement of action * * * shall govern all actions and proceedings instituted under the provisions of this Act." Subd. E of § 24 involved here does not provide otherwise.

state court at some undetermined date (I R. 116)[15] was not self executing and, therefore, could not constitute waiver of process or an authorization of appearance in the future state court action. *Griffin* v. *Griffin*, 327 U.S. 220, ret. den. 328 U.S. 876.

Nor could it constitute notice, for, as the Court said in *Armstrong* v. *Manzo*, 380 U.S. 545, 550, 552:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances to apprise interested parties of the *pendency* of the action and afford them an opportunity to present their objections.
>
> * * *
>
> It is an opportunity which must be granted *at a meaningful time and in a meaningful manner.*" (emphasis supplied)

Accordingly, the question as to whether James and Michael were denied due process in the state court action hinges solely on the issue of Kelton's authority to appear for them.

As noted by the Court below, neither James nor Michael ever spoke or corresponded with Kelton and, therefore, never retained him themselves, p. 19a, *infra*, 393 F. 2d at 384. As shown above, pp. 16-18, *supra*, the evidence is also clear that neither James nor Michael ever expressly retained Dorsey as their attorney in the matter of partition and sale or in regard to the state court proceeding or authorized him to retain another attorney on their behalf and that Dorsey himself based his claim of authority to act for them in said matter solely on his employment by them in another matter wholly unconnected with the partition and sale agreement or the state court proceeding (III R. 1246), which obviously gave him no authority to act for

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[15] The agreement provided: "As quickly as practicable, the Bank shall prepare and file a petition praying for a judgment as specified in Section 4.01."

them in the latter matter.[16] In the light of these facts, the Court below could find no other basis for the jury's finding of Kelton's authority than the circumstance that Dorsey had written a letter to Mrs. Grey on November 9, 1960 (10 days prior to the commencement of the action) advising her that he had authorized Kelton to represent her and her sons (VIII R. 1135-1136), from which the Court below inferred:

> "that the jury could reasonably have found that the Dallas transaction was a family affair, that the mother spoke for the family, and that Dorsey was the family attorney protecting the family interests," p. 21a, *infra*, 393 F. 2d at 385.[17]

Thus, the theory of the Court below is that there was employment of Kelton by estoppel, not because of anything James or Michael did, but because Mrs. Grey did nothing when advised by Dorsey that he had authorized Kelton to appear for James and Michael. In so reasoning, the Court below completely overlooked the fact that the partition and sale agreement completely negated any authority of Mrs. Grey to act for her sons (I R. 116) and Dorsey's admission that he had predicated his authority solely on his employment by James and Michael in another matter, rather than on any claim that he had been retained by Mrs. Grey to represent her sons (III R. 1246), which he knew she had no authority to do in any matter (V R. 46, 48).

Not only is the holding of the Court below contrary to the record herein and legally unsound, since it implies an attorney's authority on the basis of unsupportable infer-

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[16] 7 C.J.S. p. 897; *Hotel Longview* v. *Pittman*, 376 S.W. 2d 915 (Tex. Civ. App. 1955, ref. n.r.e.); *Sullivan* v. *Dunne*, 198 Cal. 183, 190; *Greenlaw* v. *Pettit*, 87 Tenn. 467.

[17] As demonstrated above, pp. 16-18, *supra*, the other facts relied upon by the Court below in support of that conclusion are contrary to the record herein.

ences from inferences,[18] but is wholly untenable in the circumstance noted by the Court below, p. 9a, *infra*, 393 F. 2d at 378-379 that attorney Kelton was representing the trustee. Indeed, such representation of adverse and conflicting interests disqualified Kelton from accepting employment by the trust beneficiaries. Under Texas law, even Kelton's express employment by the trust beneficiaries would have been ineffective as a matter of public policy and would have rendered a judgment based on his appearance for the beneficiaries void or at least voidable.[19]

That the due process clause of the 14th Amendment is violated when a state court purports to render a judgment without having acquired jurisdiction of the defendant either by adequate service of process or by an authorized appearance of an attorney on his behalf has been settled by this Court in such cases as *Cooper* v. *Newell*, 173 U.S. 555,

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[18] This holding of the Court below is strikingly at odds with its holding elsewhere in its opinion that "the fact of agency must be proved and cannot be presumed", p. 23 c, *infra*, 393 F. 2d at 386.

[19] Thus, in *Covey* v. *Knight*, 215 S.W. 2d 684 (Tex. Civ. App. 1948, ref. n.r.e.), the Court said at p. 688 with respect to the representation of the trustee and the remaindermen by the same attorney

> "[the remainderman] are correct in their assertion that J.A. Moore was not qualified to represent them as attorney * * *. That the judgment was voidable can hardly be questioned. * * *"

To the same effect, *Payne* v. *Livingston*, 283 S.W. 701 (Tex. Civ. App. 1923). In *J. W. Hill & Son, Inc.* v. *Wilson*, 399 S.W. 2d 152, 155 (Tex. Civ. App. 1966) the Court held that the representation by an attorney of conflicting interests, even if agreeable to adverse parties, is fundamentally wrong and against public policy. To the same effect, *Bryant* v. *Lewis*, 27 S.W. 2d 604, 608 (Tex. Civ. App. 1930). These cases apply a fortiori here, since not only none of the Greys was ever advised of the conflict of interest between the Bank as trustee and themselves in regard to the transaction here involved, but the very agreement in suit negated such conflict of interest by reciting that the conflict existed only between the Bank in its private capacity and the Bank as trustee (I R. 108).

Griffin v. *Griffin,* 327 U.S. 220, reh. den. 328 U.S. 876 and *Schroeder* v. *City of New York,* 371 U.S. 208.

However, the important constitutional question whether due process is violated when, in the absence of any service of process, the jurisdiction of the state court is based solely on the appearance for the defendants of an attorney disqualified to represent them by reason of his representing in the same action the conflicting interests of the adverse party has not been, but should be settled by this Court.

Conclusion

The Questions raised by this petition are questions of Federal civil procedure of substance, resolved by the Court below in a way not in accord with this Court's decision in *Callen,* or in conflict with decisions of other courts of appeals, a question calling for the exercise by this Court of its power of supervision and an important constitutional question of due process under the 14th Amendment.

The petition should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22988

CORNELIA O'CONNOR GREY, JAMES CHARLES GREY and MICHAEL CARTER GREY,

Appellants,

versus

FIRST NATIONAL BANK IN DALLAS, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

(March 21, 1968)

Before:

BROWN, *Chief Judge*, and GEWIN and WRIGHT,* *Circuit Judges*.

WRIGHT, *Circuit Judge*: Appellants, Cornelia O'Connor Grey, and her two sons, James Charles and Michael Carter Grey, beneficiaries of the James Charles O'Connor Trust, brought suit against appellee First National Bank in Dallas, Trustee of the O'Connor Trust, in the United States District Court for the Northern District of Texas, alleging

* Of the District of Columbia Circuit, sitting by designation.

First National's complete disregard of its fiduciary duties in fraudulently acquiring trust property for its own use. Appellants sought rescission of a 1960 Partition and Sale Agreement through which the property was acquired. In the alternative, appellants demanded damages, actual and exemplary, based on alleged fraud. The case was submitted to the jury on a special verdict form. On the basis of its findings, judgment was entered dismissing plaintiffs' complaint on the merits. We affirm.

Of crucial importance in this extremely complicated lawsuit are the events preceding the signing of the Partition and Sale Agreement in September 1960 and the circumstances surrounding the Texas state court judgment of November 28, 1960, which approved that transaction, thereby relieving the bank of the restrictions against self-dealing imposed by the Texas Trust Act. Since this appeal presents, *inter alia*, a claim that the District Court erred in not directing a verdict in plaintiffs' favor and in overruling plaintiffs' motion for judgment notwithstanding the verdict, we shall review the evidence in some detail.

I

In 1910 James Charles O'Connor created a testamentary trust for the benefit of his wife, three daughters and grandchildren. His will provided that after the death of his wife the income would be divided equally among his daughters, and as each daughter died, the remainder in that daughter's share would go to that daughter's lawful issue in equal shares *per stirpes* or, in default of such issue, to such person or persons as were designated in that daughter's will. Shortly after his wife's death, one of the daughters died without issue. Her will provided that her third of the trust go in fee simple in equal undivided amounts to her two surviving sisters. The second daughter also died without issue; a settlement arising from a contest of her will provided that almost half of her original interest in the trust go in

fee simple to her sole surviving sister, Mrs. Cornelia O'Connor Grey, with the remainder of her interest being placed in a charitable trust—the Morgan Trust. Thus, of the property originally placed in the O'Connor Trust, 20/60ths. remains in that trust, 19/60ths is owned by Mrs. Grey in fee simple, and the Morgan Trust owns 21/60ths in fee simple. Mrs. Grey is the sole income beneficiary of the O'Connor Trust and her sons, James and Michael, are her lawful issue and therefore the remaindermen to whom the trust properties will be delivered upon the termination of that trust at Mrs. Grey's death.

The principal assets owned jointly by the O'Connor Trust, the Morgan Trust and Mrs. Grey individually are eight downtown Dallas lots. First National has been the successor trustee of the O'Connor Trust since its merger in 1954 with the prior trustee, Dallas National Bank. In addition, since 1954 First National has been the successor trustee of the Morgan Trust and agent for Mrs. Grey under a written agency agreement for the management of her 19/60ths interest in the jointly owned Dallas property.

Prior to the merger of First National and Dallas National Bank, Mrs. Grey, the O'Connor Trust and the Morgan Trust owned Tract 8 (Republic Garage Building) which is west of the center of the block, extending from Pacific Street on the north through to Elm Street on the south, with a frontage on both streets of over 50 feet. First National considered acquiring this property for a proposed motor bank and in 1950 approached Dallas National Bank, Trustee, not directly but through Z. L. Majors, agent for undisclosed principal. The attempted acquisition was unsuccessful, but First National obtained a long term lease on the property immediately adjoining Republic Garage to the east, and began constructing the motor bank and underground passage to connect the motor bank with its main office directly south across Elm Street. Early in 1954, still prior to its merger with Dallas National Bank, First National again considered acquiring a long term lease of

the Republic Garage Building, again using Majors, but this time disclosing the previously undisclosed principal. However, further steps were abandoned since the proposed merger was soon to be effected.

Shortly after the merger, Z. L. Majors, Trustee (now ostensibly acting for the Murchison interests), purchased the lot adjoining Republic Garage on the west (the A'Mell Building). The purchase price of that building was $650,000, the whole amount having been borrowed by Z. L. Majors, Trustee, from First National. When the Murchisons declined to proceed with the transfer and several other potential takers balked, the A'Mell property was offered to Mrs. Grey, the O'Connor Trust and the Morgan Trust in an even trade for their Republic Garage Property. First National's trust officer approved the trade and recommended that Mrs. Grey proceed, without telling her that the money used to purchase the property came wholly from First National, that First National's general counsel represented both the O'Connor Trust and Z. L. Majors, Trustee, and that the appraisal submitted to Mrs. Grey (the so-called Dunham appraisal) was 100,000 in excess of Majors' purchase price.

One month after the exchange of properties, Majors offered to sell Republic Garage to First National for cancellation of the $650,000 debt. First National refused. Subsequently a National Bank Examiner criticized the unsecured loan, as did First National's internal examining committee, for although all interest had been paid when due, there had been no repayment of any part of the principal. Finally First National was given a deed of trust for Republic Garage for the amount of Majors' indebtedness.

Meanwhile, Mrs. Grey became dissatisfied with the A'Mell property; contrary to her expectations and representations made by First National's trust officer, the rental income from the building decreased rather than increased. This, together with other grievances she had stemming from First National's handling of her trust properties,

prompted Mrs. Grey in March 1958 to give notice to First National of her intention to revoke her agency agreement with respect to those properties in which she held an interest individually and to substitute for First National its leading competitor, Republic National Bank of Dallas.

As early as January 1956, First National had tried to persuade Mrs. Grey to partition the various properties held in undivided interests by the O'Connor Trust, the Morgan Trust and Mrs. Grey individually. It had explained to her that it believed that the Morgan Trust was being disadvantaged by her unwavering decision to retain the real estate in her father's estate [1] and that such a partition would enable First National to perform more effectively its fiduciary duties to all parties concerned. When, in 1958, Mrs. Grey indicated her intention to revoke First National's agency agreement, First National again asserted its desire to partition. Mrs. Grey then temporarily withdrew her threatened revocation, but First National continued to press for partition.

In preparation for such a partition, First National requested the Dallas Real Estate Board to appraise all of the relevant properties. This appraisal was completed by October 1959, but Mrs. Grey was having difficulties deciding how she wanted the properties partitioned. First National made no suggestions or proposals, but continually repeated its desire to have the partition completed as soon as possible. In March 1960 Mrs. Grey made her "final decision" to partion the A'Mell property to the Morgan Trust, since its value, according to the 1959 appraisal, was now only $500,000 and she had neither the time nor the money with which to develop the property.

During the time that the parties were preparing for the partition, First National was considering the advisability

[1] The agency agreement entered into between Mrs. Grey and First National specifically limited First National's power so that it was without authority to sell or exchange Mrs. Grey's interest without first obtaining her consent.

of constructing a new bank building. A site study committee was appointed to make an investigation. At an executive committee meeting on March 3, 1960, the results of that investigation were reviewed, but the four plans presented were all rejected. Instead, the consensus was to acquire, if possible, all of City Block 60, in which was situated First National's motor bank and the A'Mell property. Three real estate firms were then engaged to acquire the eastern half of the block and their combined efforts bore fruit shortly thereafter.

Having been advised of the realtors' success, First National's president, Mr. Stewart, notified the bank's trust officer that the pending partition was to be postponed until agreement was reached with respect to the A'Mell property. A meeting was arranged with Mrs. Grey and her attorney, Mr. Leo Dorsey, to take place in New York on April 25, 1960. At that meeting Mr. Stewart informed Mrs. Grey of the bank's interest in the A'Mell property and told her that, because of a potential conflict of interests, First National would resign as trustee of the O'Connor and Morgan Trusts. Mrs. Grey insisted that resignation was not necessary and she adhered to this position even after she was informed that if the bank remained trustee a court proceeding would be required to free First National from the restrictions against self-dealing in the Texas Trust Act. Mrs. Grey stated that the only condition she would impose was that she get a better price than Majors would be getting for Republic Garage. It was also agreed at this time, pursuant to Mr. Dorsey's suggestion, that, prior to the sale, the A'Mell property would be partitioned to Morgan Trust since that Trust was entitled to favorable tax treatment.

On May 10, 1960, the Board of Directors of First National officially approved acquiring all of City Block 60. It was at this time that Majors deeded the Republic Garage to the bank in liquidation of his $650,000 indebtedness. First

National offered Mrs. Grey $750,000 for A'Mell [2] and she tentatively accepted. Dorsey then advised her against it and negotiations continued, culminating in a series of meetings in Dallas in early September 1960. Present were Mr. Stewart, First National's chairman of the Building Committee and its general counsel, Mrs. Grey, her son James, and Mr. Dorsey. Mr. Stewart offered to call someone in from the trust department, which suggestion was rejected, and he again offered to have First National resign as trustee of the two trusts, which was also rejected. Dorsey spent the morning of the first day criticizing the bank's past handling of trust affairs and the afternoon was spent discussing property values in City Block 60. The second morning, Dorsey was given, at his request, a schedule of prices paid for other properties in the block and there was some discussion of whether at the time of purchase and sale of Republic Garage Majors was First National's nominee or First National had any interest in that property. All such inquiries were answered by First National's representatives in the negative. That afternoon, Mrs. Grey called the bank, stating that an acceptable price at which to value A'Mell was $1,155,000. That figure was arrived at by multiplying the interior area by the per square foot figure to be paid Majors and computing the corner area in the same manner at an additional 25 per cent for corner property. The next day, Mr. Stewart obtained approval of the Board of Directors' Executive Committee to accept the $1,155,000 price, and that evening he and Mrs. Grey shook hands on the deal.

First National's general counsel drafted a Partition and Sale Agreement which provided for the partition of

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[2] Since the A'Mell property was to be partitioned to Morgan Trust prior to the sale, neither Mrs. Grey individually nor the O'Connor Trust was technically a seller. Nevertheless, First National sought to obtain Mrs. Grey's approval of the purchase price because that price would in turn be the value assigned to A'Mell for purposes of the partition agreement.

several tracts of property[3] and for the purchase of one of those tracts (A'Mell) by First National for $1,155,000. The Agreement stated that both the partition and the sale were subject to a judgment being entered by a court of competent jurisdiction in a proceeding in which all of the persons bound by the Agreement, the Attorney General of Texas,[4] and the remaindermen, James and Michael Grey, were parties. In contemplation of such a suit, First National agreed to retain for the O'Connor Trust counsel recommended by Mrs. Grey, and Mrs. Grey agreed to file an answer praying that the Agreement be approved and to recommend to the remaindermen that they file a similar answer. Finally, all persons agreed to cooperate in consummating the Agreement in the most expeditious manner possible; indeed, the Agreement specifically stated that in the event the judgment was not final by December 31, 1960, all rights and duties under the Agreement would terminate.

The Partition and Sale Agreement was presented to Mrs. Grey and James for their signatures, but they left Dallas that evening for New York without signing. Aboard the plane, Dorsey explained the various provisions of the Agreement first to Mrs. Grey and then again to James. The following Monday, September 19, Mr. Stewart flew to New York where Mrs. Grey and James signed the Agreement. Mrs. Grey then flew to Paris, France, where on October 8,

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[3] A'Mell, valued at $1,155,000, was partitioned in its entirety to Morgan Trust. The value of the remaining seven tracts was, according to the 1959 Dallas Real Estate Board appraisal, $1,675,000, and these seven properties were partitioned to Mrs. Grey individually and the O'Connor Trust in undivided interests of 19/39ths and 20/39th respectively. Since the value assigned A'Mell exceeded Morgan Trust's 21/60th interest in all eight properties by $164,500. Morgan Trust was to pay to Mrs. Grey individually $80,141.03 and to the O'Connor Trust $84,358.97.

[4] Under Texas law, the Attorney General was necessary as a representative of the public beneficiaries of the Morgan charitable Trust. Article 4412a, Revised Civil Statutes of Texas.

Michael signed his name. Neither James nor Michael was named as a contracting party to the Agreement, but each executed it, stating his approval, ratification and adoption with the same force and effect as if he were a party thereto.

Mrs. Grey neither selected nor retained counsel to represent her or her sons in the Texas court proceedings. She seemed intent on having the deal go through and did not want independent counsel to complicate a relatively simple agreement. First National then suggested that Mr. Philip Kelton represent the O'Connor Trust since his firm had previously done some work for it. Kelton in turn contacted Dorsey, asking if he were also authorized to represent Mrs. Grey and her sons, and Dorsey assured him that he was so authorized. On November 19, 1960, First National initiated suit in a state district court in Dallas County, Texas, with the bank in its individual capacity as plaintiff and the bank as trustee of the O'Connor Trust, the bank as trustee of the Morgan Trust, appellants here and the Attorney General of Texas as parties defendant. First National asked the court to find that the partition and sale provided for in the Partition and Sale Agreement were fair and equitable, to rule that it was relieved from restrictions under the Texas Trust Act with respect to self-dealing, and to approve and confirm the Partition and Sale Agreement. Kelton filed a joint answer on behalf of First National as trustee and appellants here, admitting the truth of the allegations in the petition and praying that the judgment sought be granted.[5] A hearing was scheduled for November 26.

The hearing lasted the greater part of the day and was characterized by the presiding judge as "a more than fair disclosure." Judgment was entered on November 28 and became final 30 days thereafter, just a few days before the December 31 deadline. Despite the fact that Mrs. Grey

[5] Morgan Trust represented by independent counsel (Mr. Armstrong) who had been selected by First National, filed a similar answer.

then refused to sign the Partition Deed (and has not signed the Deed to this day), the sale from the Morgan Trust to First National in its individual capacity was consummated. First National subsequently obtained the outstanding properties in City Block 60 and broke ground for its 52-story bank and office building.

In February 1961 Mr. Dorsey presented Mrs. Grey with a bill in the amount of $100,000 for attorney fees in connection with Mrs. Grey's transactions in Dallas. In the spring of that year, she was served in New York with a summons to appear in a lawsuit there against her individually for those fees, now valued at $140,000 plus $256.59 disbursements. Mrs. Grey then sought other New York counsel, present counsel of record, to defend her against Dorsey. An answer was subsequently filed in the New York courts denying liability, and a counterclaim was filed against Dorsey for damages resulting from unskillful and grossly negligent representation of Mrs. Grey. At the same time, counsel wrote First National that he believed the Partition and Sale Agreement was unenforceable and that "in disposing or otherwise dealing with the real property in question * * * you will be acting at your sole risk and peril." Nonetheless, First National proceeded with its plans and by the time this suit was brought in May 1963 its building, occupying the entire City Block 60, was completed.

II

We turn now to a consideration of appellants' specification of errors. They argue first that the District Court erred in denying their motions for a directed verdict or for judgment *n.o.v.* because the undisputed evidence conclusively showed, as a matter of law, that First National failed to make the requisite full disclosure to appellants of all facts within its knowledge material to its self-dealing.[6] We

[6] Appellants allege that the evidence established that First National (1) concealed its deed of trust covering Majors' $650,000 loan;

do not agree. Only where the evidence is such that there can be but one reasonable conclusion as to the verdict to be returned may the court grant a motion for a directed verdict. *Brady* v. *Southern Railway Co.*, 320 U.S. 476, 479-480 (1943). On the other hand where, as here, there are facts in the record as to which there is a genuine dispute and from which reasonable minds might draw different inferences,[7] it is incumbent upon the court, as it did in the instant case, to submit the question to the jury. See, *e.g.*, *Pan American Petroleum Corp.* v. *Orr*, 5 Cir., 319 F. 2d 612, 617 (1963). Moreover, appellants had the burden of proving a breach by First National of its fiduciary duties, and when the party moving for a directed verdict has such a burden, the evidence to support the granting of the motion must be so one-sided as to be of overwhelming effect. 2B W. Barron & A. Holtzoff, Federal Practice and Procedure § 1075 at 396 (Wright ed. 1961); 5 J. Moore, Federal Practice ¶ 50.02[1] (2d ed. 1967). Considering the evidence before us as we have recited it in our statement of the facts, we find that the District Court properly submitted the case to the jury.

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(2) misrepresented its relationship with Majors; (3) concealed the proposed Sanger-Harris project which was to occupy the entire City Block 232 immediately north of City Block 60 (knowledge of this project was allegedly acquired by First National through its officers and directors who were also officers and directors of the Baptist Foundation of Texas, an organization that was instrumental in assembling City Block 232); and (4) concealed, if not falsified, its over-all costs of acquiring City Block 60 since, although Mrs. Grey was given a schedule of prices paid to the owners of the other fees in the block, no information with respect to the costs of terminating existing leaseholds or brokers' commissions was ever furnished her. (First National did furnish these figures to its own Board of Directors, thereby allegedly showing that reasonable businessmen would consider such information material.)

[7] Thus there is a dispute as to what First National said with reference to Majors; when information of the Sanger-Harris project can first be attributed to First National; and what information Dorsey had or received with respect to leaseholds and brokers' commissions.

The jury's resolution of the disputed facts is quite clear. The jury was asked:

> "SPECIAL ISSUE No. 2
>
> "Do you find from a preponderance of the evidence that the First National Bank in furnishing information to Mrs. Grey, James Grey, and Michael Grey leading to the partition and sale agreement of September 19, 1960 and the judgment of the State Court of November 28, 1960 made any material misrepresentations?
>
> "Answer 'yes' or 'no' as to each party."

The jury answered "no" as to every party. The jury was also asked:

> "SPECIAL ISSUE No. 3
>
> "Do you find from a preponderance of the evidence that the First National Bank in the negotiations with Mrs. Grey, James Grey, and Michael Grey leading to the partition and sale agreement of September 19, 1960 and the judgment of the State Court of November 28, 1960, concealed any material facts?
>
> "Answer 'yes' or 'no' as to each party."

Again the jury answered "no" as to every party. These questions were all-inclusive: all of appellants' allegations were fully developed at trial and all were resolved against them. The court in charging the jury made it clear that the fraud issue related not only to the execution of the Partition and Sale Agreement, but to the entry of the state court judgment as well. The questions as phrased had the same effect.[8] The jury might have found that

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[8] Since the jury found that the state court judgment was not procured by fraud, this court need not reach an issue which would otherwise assume paramount importance. Thus, in supplemental briefs, the parties have devoted considerable time and effort to explaining the difference between "extrinsic" and "intrinsic" fraud

there was no misrepresentation or no concealment or that those found were not material.[9] The scope of our review

insofar as it relates to setting aside a prior judgment. Such discussion was probably considered necessary since the parties admitted that under Texas law (which we must apply since in these proceedings we are exercising diversity jurisdiction, *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938)) a prior judgment can be set aside for lack of jurisdiction or for fraud, *O'Boyle* v. *Bevil,* 5 Cir., 259 F. 2d 506, 512 (1958), *cert. denied,* 359 U.S. 913 (1959), but the fraud which is a valid ground for such purposes must be "extrinsic" to the prior judgment. *Alexander* v. *Hagedorn,* Tex. Sup. Ct., 226 S.W. 2d 996, 1001 (1950). The jury's determination that there was no fraud makes the inquiry as to whether the allegations constituted extrinsic or intrinsic fraud of academic interest only.

This case is another vivid illustration of the great utility of the Rule 49(a), *Fed. R. Civ. P.*, general charge and special verdict which this court so often heralds. See, *e.g., Weymouth* v. *Colorado Interstate Gas Company,* 5 Cir., 367 F. 2d 84, 93, n. 31 (1966); *American Oil Company* v. *Hart,* 5 Cir., 356 F. 2d 657, 659 and n. 5 (1966). The general charge illumines the verdict questions-answers and vice versa. Every critical fact has been exercised against nearly every likely contingency to enable us to analyze the legal contentions against specific, identifiable findings, not just a series of assumed implied findings from an unrevealing general verdict and its enigmatic mysteries. See, *e.g.,* Notes 10, 12 and 13 *infra* and related text. By this method our inquiries were simplified to determine as to each challenge (a) the formal correctness of the verdict answer and supporting charge, (b) the substantive correctness of the charge and verdict question, and (c) the sufficiency of the evidence to support the answer.

[9] Thus, for example, with respect to Majors, his connection with First National and the deed of trust would be material, and First National's failure to disclose or its concealment would be a breach of its fiduciary duties, only if First National would not have paid Majors the same price had he not been so indebted. There was evidence, however, that there was never any talk of foreclosure or of First National's power to foreclose, that the Republic Garage property simply was not worth more than $650,000, and that B. H. Majors, Z. L. Majors' brother, partner and an accommodating party on the note held by the bank, was worth, at a conservative estimate, over a million dollars.

is such that we neither sift facts nor draw inferences from such facts. This function is performed by the jury and so long as the evidence has that minimal quality required to send the case to the jury, the jury's resolution of the factual issues will prevail. *Williams* v. *National Surety Corp.*, 5 Cir., 257 F.2d 771, 772-773 (1958).

Assuming that the evidence was sufficient to take the case to the jury, appellants maintain that the verdict still may not stand because the charge to the jury was both incomplete and misleading. They argue first that the District Court, in effect, refused to advise the jury of their contention that simple failure on the part of First National, as trustee, to disclose material facts was an issue. Appellants refer specifically to the court's comment:

> "The issues in this case for your decision are: (1) Whether the First National Bank in its individual capacity misrepresented or concealed material facts which were relied on to the damage of Plaintiffs * * *."

By using "misrepresented" and "concealed," appellants assert, the court placed an undue burden upon them, since such words not only connote affirmative acts, unlike negative silence in failure to disclose, but in addition may even connote bad faith. We find no merit in this argument. We have repeatedly held that a charge "must be viewed as a whole, in connection with the contentions aired by the parties in the Court below, and it must be viewed from the standpoint of the jury." *See, e.g., Garrett* v. *Campbell*, 5 Cir., 360 F.2d 382, 386 (1966). Considered as a whole, we find that the court did charge the jury that an issue was First National's failure to disclose. For example, the court stated that "[i]t is the contention of Plaintiffs that the Bank as Agent and Trustee violated its fiduciary duties * * *" and that "[t]he First National Bank denies that it misrepresented or concealed any material facts, contending on the other hand, that *it made a full disclosure*

of all material facts." (Emphasis added.) The court also charged the jury that "there must be fair dealing and good faith by the Trustee toward the beneficiary" and the "Trustee * * * has a duty to impart to the beneficiary all material facts in dealings between the Trustee and the beneficiary." [10]

Moreover, in examining the record we find that appellants themselves were not always conscious of a difference between misrepresentation and concealment, on the one hand, and failure to disclose, on the other. Thus in Paragraph 19 of their complaint they stated, "Bank was under *a duty to disclose* to plaintiffs each and all of the facts alleged in paragraph 18 hereof, and *by concealing the same* * * *" (emphasis added). The same phraseology is utilized in Paragraphs 22 and 56, and if appellants may use the terms interchangeably, they should not be heard to complain if the court does also.

Appellants also object to the court's definition of "material," alleging that it completely disregarded the nature

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[10] The complete charge to the jury on this point is as follows:

"* * * [T]he relationship of principal and agent is fiduciary in nature and therefore the agent is required to be loyal and to act in good faith. The Agent * * * *has the duty of imparting to his principal,* every material fact relating to a transaction, if in the scope of the agency, on becoming aware of such facts during the course of the transaction.

"The First National Bank, in addition to being the agent of Mrs. Grey, was the Trustee of the O'Connor Trust, of which Mrs. Grey was the beneficiary, and James C. and Michael C. Grey were the Remaindermen-beneficiaries.

* * *

"You are instructed that the Trustee of a Trust occupies the position of a fiduciary of the Trust, that is, there must be fair dealing and good faith by the Trustee toward the beneficiary. The Trustee has the duty to act in the best interests of the beneficiary of the Trust, and *has a duty to impart to the beneficiary* all material facts in dealings between the Trustee and the beneficiary." (Emphasis added.)

of the confidential relationship between appellants and First National. The court's charge defining "material" [11] was a complete and accurate dictionary definition of the term. Moreover, in order to appraise its sufficiency, it must be read in conjunction with other parts of the charge bearing on the relationship of the parties. When so read, we find the charge on "material" adequate.

Finally, appellants claim that the court's instruction that Mrs. Grey was bound by the state court judgment and that James and Michael were likewise bound unless the jury found that they had not authorized Kelton to represent them was tantamount to instructing a verdict for First National on the issues of fraud and damage. Again we find no merit in this objection. The court's charge, taken as a whole, shows that the issue of the state court's jurisdiction was completely separate from the issue of whether First National fraudulently obtained that judgment. The distinction is also clear from the special interrogatories: Special Issue No. 1 went to Kelton's authority; Special Issues Nos. 2 and 3 to the alleged concealment or misrepresentation. We therefore see no basis for appellants' contention that the jury might have believed that if it answered "yes" as to Kelton's' authority, it was bound to answer "no" as to fraud.

Since we find that the evidence was sufficient to take the case to the jury, that there were no errors requiring reversal in the court's charge, and that the jury's verdict is amply supported by the record, we hold that appellants' motions for a directed verdict,[12] for judgment *n.o.v.*, and for a new trial were properly denied.

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[11] "As to the term 'material', as used in this charge, I instruct that for a fact to be 'material' to a transaction, it should be of solid or weighty character; substantial; of consequence; not to be dispensed with; important."

[12] Appellees correctly note that, even if the court had directed a verdict for appellants, it would then have had to submit to the jury the question of the amount of damages sustained by appellants. In fact, such a question was given to the jury:

"SPECIAL ISSUE No. 5

"Do you find from a preponderance of the evidence that Mrs. Grey, James C. Grey, or Michael C. Grey were damaged by such misrepresentations, if any, or concealments, if any?

"Answer 'yes' or 'no' as to each party."

The jury answered "no" as to every party. Perhaps of even greater significance is the jury's negative answer to the following:

"SPECIAL ISSUE No. 11

"Do you find from a preponderance of the evidence that the A'Mell Building had a fair market value in excess of $1,155,000.00 on September 19, 1960?

"Answer 'yes' or 'no'."

Therefore, even if the court had erred in not directing a verdict for appellants, appellants would not have been prejudiced thereby.

Appellants also sought exemplary damages, but, according to Texas law, such recovery presumes a showing of malice, *Baker* v. *Moody*, 5 Cir., 219 F. 2d 368, 371 (1955); *Mossop* v. *Zapp*, Tex. Civ. App., 189 S.W. 979, 981 (1916), which the jury was unable to find, as is illustrated by its negative answer to the following:

"SPECIAL ISSUE No. 7

"Do you find from a preponderance of the evidence that the First National Bank acted with malice in its actions relating to the partition and sale agreement of September 19, 1960 or in obtaining the Judgment of the State Court of November 28, 1960?

"Answer 'yes' or 'no'."

III

Appellants also contend in their specification of errors that the District Court should have directed a verdict in favor of James and Michael Grey since the evidence showed that they were denied due process of law with respect to the 1960 state court judgment. Appellants' complaint stated that James and Michael "were never personally or constructively served with process in the aforesaid action, nor

did they appear therein either personally or by a duly appointed attorney," and that consequently the state court judgment is void as to them. Appellants acknowledge that the judgment itself stated that "[a] 11 persons having any interest in the subject matter of this suit are properly before the Court," but they correctly note that the fact that the judgment recites jurisdiction does not necessarily prevent the court from inquiring into facts disclosed by the complete record. *O'Boyle* v. *Bevil,* 5 Cir., 259 F.2d 506, 518 (1958), *cert. denied,* 359 U.S. 913 (1959); *Lutcher* v. *Allen,* 43 Tex.Civ.A. 102, 95 S.W. 572 (1906).[13]

Appellants admit that Dorsey told Kelton that Kelton was authorized to represent James and Michael, and that Kelton, in good faith reliance upon that representation, filed an answer on their behalf in the state court proceeding.[14] There is also no dispute that Dorsey was authorized

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[13] Normally the relevant record would be that of the prior court's proceeding, but since counsel for First National made no objection to the introduction in the District Court of any of appellants' evidence which might be probative of the state court's lack of jurisdiction over James and Michael, we have given such evidence the same force it would be entitled to if it were part of the original record. See, *e.g., Texas Pacific Coal & Oil Co.* v. *Ames,* Tex. Civ. App., 284 S.W. 315, 317 (1926), *reversed on other grounds,* Tex. Comm. App., 292 S.W. 191 (1927).

[14] It is undisputed that Kelton filed a *joint* answer on behalf of the O'Connor Trust and Mrs. Grey, James and Michael. Appellants claim that the joint answer, which admitted the truth of the allegations of First National's petition and asked the court "to approve the proposed transaction by entering the Judgment prayed for in Plaintiff's Petition," constituted a confession of judgment. Appellants further argue that Rule 314 of the Texas Rules of Civil Procedure provides that when judgment is confessed by an attorney, the judgment is not valid unless the judgment itself recites the power of attorney to confess such a judgment. We find this objection to be without force, since the state court proceeding cannot realistically be characterized as a confessed judgment: the hearing lasted almost a full day; six witnesses testified; 13 exhibits were introduced; the transcript covers 85 pages; the judge complimented the attorneys for "a thoroughly developed case"; and, quite significantly, the state Attorney General's approval of the proposed transaction was not given until after the *end* of the proceedings.

to speak for Mrs. Grey, but appellants assert that he was her attorney *only* and not an attorney for her sons as well.[15] Appellants claim, therefore, that Dorsey was without authority from James and Michael to engage Texas counsel to represent them. Dorsey did represent the boys in at least one other matter, but in that instance, unlike the present, Michael had supplied a specific, written authorization. Again with reference to Michael, Dorsey testified that he had not communicated with him after April 1960. Kelton had never communicated with either James or Michael, nor had representatives of First National personally contacted or attempted to contact Michael or James, with respect to the state court proceeding.[16]

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[15] Appellants note that when Dorsey sought compensation for his efforts in connection with the Dallas transaction he submitted his bill to Mrs. Grey alone. The suit which was subsequently initiated to collect his fee was also brought against her alone. In addition, Dorsey's office ledger sheet carrying the account contained only her name and not also the names of James and Michael.

[16] Appellants stress the lack of communication between First National and James and Michael, alleging that James and Michael were denied state due process insofar as they were not given the notice required by § 24E of the Texas Trust Act, Article 7425B, Texas Revised Civil Statutes:

> "A court of competent jurisdiction may * * * for cause shown and *upon notice to the beneficiaries,* relieve a trustee from any or all of the duties, limitations and restrictions which would otherwise be placed upon him by this act." (Emphasis added.)

We need not reach appellees' claim that James and Michael are not beneficiaries within the meaning of this section and therefore not necessary parties to the suit. Instead, since we affirm the finding of the District Court that Kelton was authorized to represent James and Michael, we merely note that under Rule 121 of the Texas Rules of Civil Procedure, an answer constitutes an appearance of the defendant so as to dispense with the necessity for the issuance or service of citation upon him. Moreover, since the notice requirement of the Texas Trust Act is to give notice, we can find no harm to James or Michael, who had each signed the Partition and Sale Agreement

Appellants assert that, given this evidence, it was error for the District Court to deny their motion for a directed verdict as to James and/or Michael Grey. We do not agree. As noted above, the party moving for a directed verdict has a heavy load, particularly when he also carries the burden of proof on the issue in question. 2B W. Barron & A. Holtzoff, Federal Practice and Procedure § 1075 at 396 (Wright ed. 1961); 5 J. Moore, Federal Practice ¶ 50.02[1] (2d ed. 1967).[17] Here, as with the issue of fraud, we find that the evidence is not such that it showed without dispute that James and Michael did not authorize the employment of Kelton to represent them. Accordingly, we find that the District Court properly denied appellants' motion and submitted the issue to the jury.

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which, according to its terms, was conditioned upon the entering of a judgment in such a proceeding to be commenced as soon as possible.

[17] An attorney who enters an appearance for a party is presumed to be authorized to do so. *Hidalgo County Drainage Dist.* v. *Magnolia Petroleum Co.*, Tex. Civ. App., 47 S.W. 2d 875, 876 (1932); *Dyer* v. *Johnson*, Tex. Civ. App., 19 S.W. 2d 421 (1929). Appellants attempt to counteract this argument by pointing out that no presumptions, particularly as to jurisdiction, prevail with respect to judgments, such as the 1960 state court judgment, rendered pursuant to special statutory requirements. *Mingus* v. *Wadley*, Tex. Sup. Ct., 285 S.W. 1084, 1089 (1926); *Cunningham* v. *Robison*, 104 Tex. 227, 136 S.W. 441 (1911). First National argues that the purpose of the provisions of § 24E of the Texas Trust Act by which it submitted the Partition and Sale Agreement to judicial scrutiny is to enable a trustee to put to rest once and for all any questions of unfairness or improper self-dealing on its part. We do not agree, since we find no evidence of legislative intent that this action have any more conclusive effect of finality than would any other Texas judgment. But neither do we believe that a recitation of the law that no presumptions with respect to jurisdiction attach to statutory actions counteracts or even is relevant to the proposition that an attorney who appears in court for a party is presumed to be authorized to represent that party.

The issue was phrased as follows:

"SPECIAL ISSUE No. 1

"Do you find by a preponderance of the evidence that Philip Kelton did not have authority to represent James C. Grey or Michael C. Grey in the case of First National Bank against Cornelia O'Connor Grey et al., in the 116th Judicial District Court, Dallas County, Texas?

"Answer as to each party, 'He was not authorized' or 'He was authorized'."

The jury answered as to both James and Michael "He was authorized," and we find that there is sufficient evidence in the record to support this conclusion.[18] James was personally present and actively participated in the September negotiations in Dallas; at that time Dorsey purported to speak for "Mrs. Grey and her sons" and James did not deny his authority to do so. Michael testified that he left the management of his interest to his mother and never disagreed with her about such matters. Mrs. Grey told Dorsey (in front of James) to direct all correspondence about the Partition and Sale Agreement to her and "she would take it up with the boys." Indeed, the letter Dorsey wrote Mrs. Grey in November 1960 saying that he had authorized Kelton to represent her and her sons reached her in Paris where she was staying with both of her sons. Thus the jury could reasonably have found that the Dallas transaction was a family affair, that the mother spoke for the family, and that Dorsey was the family attorney protecting the family interests.

Nonetheless, appellants would have this court disregard the jury's finding. They claim that it is undisputed that Dorsey authorized Kelton and that therefore the question

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[18] In effect, therefore, we find no merit in appellants' alternative specification of error, that is, that the District Court abused its discretion in denying appellants' motion for a new trial on the ground that the jury's answer to Special Issue No. 1 was contrary to the overwhelming weight of the evidence.

should have been phrased to ask whether James and Michael authorized Dorsey. As the issue was phrased, they claim, the jury might have thought that so long as Kelton was authorized by anyone, they must answer yes. We see no basis for this contention, since the jury's answer was explicit: "James C. Grey: He was authorized. Michael C. Grey: He was authorized." Moreover, Rule 49 of the Federal Rules of Civil Procedure "clearly leaves the matter of the form of a special verdict and interrogatories to the sound discretion of the trial court." *DeEugenio* v. *Allis-Chalmers Mfg. Co.*, 3 Cir., 210 F. 2d 409, 415 (1954).

Appellants also take exception to the instructions accompanying Special Issue No. 1, whereby the jury was told that authority can be conferred directly or by an agent, that it can be written or oral, and that it can be "express," "implied" or "apparent." Appellants object that there is no evidence to support the instruction as to apparent authority. Considering the evidence as we have already summarized it, we disagree and find that the District Court did not abuse its discretion either in phrasing the question to be answered or in instructing the jury on the applicable standards.

IV

Appellants also allege errors relating specifically to the conduct of the trial in the District Court, or, in the alternative, an abuse of the trial court's discretion in the handling of that trial. We find these allegations to be without merit.

Appellants first object to the trial court's refusal to admit certain documentary evidence which was probative of First National's knowledge, prior to the November 28, 1960 judgment,[19] of contemplated substantial improvements

[19] Appellants assert and appellees agree that First National's duty of disclosure did not cease with the signing of the Partition and Sale Agreement, but rather continued through the time judgment was entered by the state court on November 28, 1960.

in the block immediately north of City Block 60.[20] These documents consisted primarily of pre-September 14, 1960 letters and memoranda produced by the Baptist Foundation of Texas (BFT) at depositions of its executive secretary. First National had objected to the introduction of such documents because there was no evidence that the persons writing or receiving them [21] were at that time acting on behalf of BFT. There is evidence that an agency relationship existed after September 14,[22] and appellants would have this court find that that is a sufficient basis from which to imply a similar relationship prior to that time, so as to provide a proper predicate for the introduction of the documents. We do not agree. The fact of agency must be proved and cannot be presumed. 3 Am. Jur. 2d Agency § 349 at 706 (1962). Since it is clear that the party who seeks to introduce written evidence must in some way authenticate it, 7 J. Wigmore, Evidence § 2130 (3d ed. 1940), and since appellants made no attempt to show that the writers of the documents who could have authenticated them were unavailable as witnesses and could not have been summoned to testify, we find no error or abuse of discretion by the trial court in refusing to admit the documents in question.

Appellants' second objection is directed at the trial court's refusal to answer directly a question sent out by the jury during the course of its deliberations. The question was as follows:

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[20] This refers, of course, to the Sanger-Harris project discussed *supra* in Note 6.

[21] The two principal persons involved were a Mr. Carr Collins, a director of First National and a member of its executive committee, and a Mr. Richards, an executive in an insurance company owned and controlled by Mr. Collins.

[22] First National did not object to the introduction of documents attributable to Collins and Richards after September 14, 1960, and such documents were admitted and considered by the jury.

> "Was their [sic] any testimony to indicate whether the bank told Mrs. Grey or her attorney that Mr. Majors owed the First National bank $650,000.00 on The Republic Garage building."

Appellants requested the court to instruct the jury that there was no testimony in the record indicating First National told Mrs. Grey or her attorney about the Majors note or deed of trust. Instead, the court responded: "The Jury is the exclusive judge of the evidence." We believe the court's reply was an appropriate one. In order to answer the question on the merits, the judge would have had to review over 2,000 pages of transcript and 400 exhibits and, in the absence of direct testimony, draw an inference as to the proper answer. This would have been an insurmountable burden. As an alternative, the judge could simply have tried to recall the evidence and evaluate its significance, but in so doing she would have been acting as a 13th juror. Appellants argue that at least the trial judge should have instructed the jury that it had a right to request any portion of the testimony to be read to it in open court by a court reporter. We need not now consider this objection since appellants did not request such an instruction below. 2B W. Barron & A. Holtzoff, Federal Practice and Procedure § 1021 at 310-312 (Wright ed. 1961); 5 J. Moore, Federal Practice ¶ 46.02 (2d ed. 1967).

Appellants' third objection goes to the trial court's limiting of their time for an opening statement and closing arguments to the jury. Appellants assert that the complexity of the case, the length of the trial (three weeks), and the variety of their allegations necessitated their being given more than 30 minutes for their opening statement and one hour and 20 minutes for their closing argument. This limitation, they allege, greatly inhibited their ability properly to present and summarize to the jury their claims

and the evidence to support them. However, this is a question so clearly committed to the discretion of the trial judge that we would intervene only where there is an egregious abuse of that discretion. See, *e.g., Rosiello* v. *Sellman*, 5 Cir., 354 F. 2d 219, 220 (1965). This case simply does not satisfy that criterion and accordingly we reject appellants' allegation.

Lastly, appellants note that the District Court in granting a directed verdict for the Morgan Trust and the state Attorney General at the close of the plaintiffs' case stated:

> "I am not sure that I am making myself clear, but I think that there are two reasons why there are no grounds for setting aside the partition—one is that I do not think that it would be equitable to do it, and the second is that it has been approved by the State Court, and that the O'Connor Trust and Mrs. Grey were represented, and the lawyers who represented them were authorized to act * * *."

Appellants correctly note that the trial judge filed no findings of fact and conclusions of law as required by Rule 52, Fed. R. Civ. P., to support this conclusion. But curiously appellants do not request that this case be remanded for such findings and conclusions on the so-called equitable issues in this case. Instead, they ask that this court find that as a matter of law they are entitled to judgment. On the record evidence we are unable to make this finding.

V

Finally appellants object here to the District Court's allocation of counsel fees,[23] alleging, in brief, that the

[23] A hearing was held on May 20, 1965, on a motion for the payment by the O'Connor Trust and the Morgan Trust of the fees and expenses of the attorneys respectively retained by First National to represent such trusts.

O'Connor Trust was surcharged with fees for an attorney [24] who defended First National contrary to the best interests of the trust beneficiaries, appellants here. Appellants specifically charge that counsel for First National in its individual capacity, counsel for First National as trustee for the Morgan Trust, and counsel for the O'Connor Trust worked in conjunction with each other and filed similar, if not identical, answers, and that ironically counsel for the O'Connor Trust can only justify his presence by noting that he cross-examined the beneficiaries of the trust, James and Michael at trial and Mrs. Grey at deposition.

We begin with the general proposition that a trustee may charge his trust for attorney's fees which the trustee, acting reasonably and in good faith, incurs in defense of litigation charging him with a breach of trust. 2 A. Scott, Trusts § 188.4 (1956). We have stated that the jury found no breach of the bank's fiduciary duties and thus we may assume that First National as trustee of the O'Connor Trust was acting reasonably and in good faith. Appellants, however, object that First National "did not come into a court of equity and say with candor: 'I have defended myself successfully against claims of my beneficiaries and am entitled to an allowance for my attorneys, Messrs. Coke & Coke, my general counsel,' and that instead Bank's

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[24] Mr. Strasburger, a member of Philip Kelton's firm, was selected by First National to represent the O'Connor Trust. He testified:

> "* * * [S]omebody that was disinterested had to be in here to see that that Trust was treated right and to see whether or not the Bank had taken advantage of them, and that was the attitude in which I took employment and I made it known when I first took employment that I wasn't going to be a rubber stamp in here for the First National Bank and that I was going to reserve my decision until everything had been developed, and if I thought the Trusts hadn't been treated right, I'd be joining the Plaintiffs, and if I thought that the Trusts had a fair settlement, I would be in here fighting for it and trying to save it * * *."

stratagem was to seek an allowance for the fees of a *second* set of attorneys on the pretense that the services rendered were in defense of 'the trust' * * *." (Emphasis in appellants' brief.) We need only note that the suit was originally brought by the appellants and that they specifically named the trusts as well as First National in its individual capacity as parties defendant. Appellants should not now be heard to object that the parties they joined have defended themselves.

There is, however, one complication. It appears that the O'Connor Trust, like the Morgan Trust, was originally joined only because it would be a necessary party were the court to grant the equitable relief requested. Indeed, the court asked counsel for the O'Connor Trust:

> "THE COURT:
>
> Let me ask you this: If the Plaintiffs had brought simply a damage suit for fraud, do you think that it would have been necessary for the Trusts to have been brought in?
>
> "Mr. Strasburger:
>
> I certainly don't. I think that's what they should have done in the first place—very strongly."

Consequently, appellants assert that, when the Morgan Trust sought and was granted a directed verdict at the close of the plaintiffs' case, counsel for the O'Connor Trust should have done likewise. This would have minimized the amount of chargeable time and in turn the amount of fees recoverable from the trust.[25]

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[25] Appellants note that the Morgan Trust was charged $45,000 whereas the O'Connor Trust was charged $50,000, because the latter "took a greater responsibility in the trial of the case; and was here for a longer time in court."

Although appellants here raise a valid point, we find no prejudice. It is clear that First National could have charged the O'Connor Trust for all fees and expenses of attorneys representing it in its individual capacity since it was exonerated of a charge of breach of trust initiated by the trust beneficiaries, and it is equally clear that the bank voluntarily paid or will pay all such fees and expenses. Moreover, the allocation of counsel fees is a question of discretion vested in the District Court and we find no abuse of that discretion which would warrant either reversal or remand. *American National Bank of Beaumont* v. *Biggs*, Tex. Civ. App., 274 S.W. 2d 209 (1954).

Accordingly, the judgment of the District Court is

AFFIRMED.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1967

No. 22988

D. C. Docket No. CA 3-63-144

CORNELIA O'CONNOR GREY, JAMES CHARLES GREY and MICHAEL CARTER GREY,

Appellants,

versus

FIRST NATIONAL BANK IN DALLAS, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Before:

BROWN, *Chief Judge*, and GEWIN and WRIGHT,*
Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

* Of the District of Columbia Circuit, sitting by designation.

It is further ordered and adjudged that the appellants, Cornelia O'Connor Grey, James Charles Grey and Michael Carter Grey, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

March 21, 1968

Issued as Mandate: June 25, 1968

Petition for Rehearing

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22988

—o—

CORNELIA O'CONNOR GREY, JAMES CHARLES GREY and MICHAEL CARTER GREY,

Appellants,

VS.

FIRST NATIONAL BANK IN DALLAS, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

—o—

(June 14, 1968)

Before:

BROWN, *Chief Judge,* and GEWIN and WRIGHT,* *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby, DENIED.

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* Of the District of Columbia Circuit, sitting by designation.

APPENDIX B

TEXAS REVISED CIVIL STATUTES

Art. 7425b—12. Trustee buying from or selling to self

A trustee shall not buy nor sell, either directly or indirectly, any property owned by or belonging to the trust estate, from or to itself or an affiliate; or from or to a director, officer, or employee of such trustee, or of an affiliate; or from or to himself, a relative, employer, partner or other business associate; provided a national banking association, or a state chartered bank and trust company, or a state chartered trust company, or a state chartered bank having trust powers, or any other state chartered corporation having the right to exercise trust powers, when acting or serving as executor, administrator, guardian, trustee, or receiver, may sell shares of the capital stock of itself so owned or held by itself, for any estate, to one or more of its officers, stockholders or directors, upon a court of competent jurisdiction finding that any such sale will be to the best interest of the estate owning such shares; fixing or approving the price to be paid therefor, and the terms of sale, and upon entering an order, decree or judgment, authorizing, approving and directing such sale to be made; and provided further that a corporate trustee, executor, administrator, or guardian, when authorized by will, trust agreement, other trust instrument, or judicial order, to retain its own capital stock in trust, may exercise rights to purchase its own stock when increases in its capital stock are offered pro rata to stockholders; provided, moreover, that such exercise of rights, in the circumstances then prevailing, shall be consistent with the judgment and care which men or ordinary prudence exercise in the management of their own affairs. Acts 1943, 48th Leg. p. 232, ch. 148 § 12; Acts 1945, 49th Leg. p. 109, ch. 77 § 4.

Art. 7425b—23. Power of beneficiary

Any beneficiary of a trust affected by this Act may, if of full legal capacity and acting upon full information, by written instrument delivered to the trustee, relieve the trustee as to such beneficiary from any or all of the duties, restrictions, responsibilities and liabilities which would otherwise be imposed on the trustee by this Act, including the release of the trustee from any or all liability to such beneficiary for past violations of any of the provisions of the Act, except as to the duties, restrictions, and liabilities imposed on corporate trustees by Sections 10, 11, and 12 herein. Acts 1943, 48th Leg. p. 232, ch. 148 § 23.

Art. 7425b—24. Power of the court

A. The district court shall have original jurisdiction to construe the provisions of any trust instrument; to determine the law applicable thereto; the powers, responsibilities, duties, and liability of trustee; the existence or non-existence of facts affecting the administration of the trust estate; to require accounting by trustee; and to surcharge trustee.

B. In cases where there be a single trustee, the venue of such actions shall be in the county of the residence of such trustee; or if a corporation, in the county of its principal place of business. Where there are two or more trustees, then the venue shall be in the county where the principal office of the trust is maintained.

C. Actions hereunder may be brought by a trustee, beneficiary, or any person affected by or having an active interest in the administration of the trust estate. If the action is predicated upon any act or obligation of any beneficiary, such beneficiary shall be a necessary party to the proceedings. The only necessary parties to such actions

shall be those persons designated by name in the instrument creating the trust, and any persons who may be actually receiving distributions from the trust estate at the time the action is filed; contingent beneficiaries designated as a class shall not be necessary parties.

D. Except as otherwise provided herein, the provisions of the statutes and rules of court governing civil procedure, commencement of action, process, process by publication, appointment of guardians ad litem, supersedeas and appeal, shall govern all actions and proceedings instituted under the provisions of this Act.

E. A court of competent jurisdiction may, for cause shown and upon notice to the beneficiaries, relieve a trustee from any or all of the duties, limitations, and restrictions which would otherwise be placed upon him by this Act, or wholly or partly release and excuse a trustee, who has acted honestly and reasonably, from liability for violations of the provisions of this Act. Acts 1943, 48th Leg. p. 232, ch. 148 § 24.

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No. 513

In the

Supreme Court of the United States

OCTOBER TERM, 1968

CORNELIA O'CONNOR GREY, JAMES CHARLES GREY, AND MICHAEL CARTER GREY,

Petitioners,

v.

FIRST NATIONAL BANK IN DALLAS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR FIRST NATIONAL BANK IN DALLAS IN OPPOSITION

HENRY C. COKE, JR.,
JOHN N. JACKSON,
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No. 513

In the

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OCTOBER TERM, 1968

CORNELIA O'CONNOR GREY, JAMES CHARLES GREY, AND MICHAEL CARTER GREY,

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FIRST NATIONAL BANK IN DALLAS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR FIRST NATIONAL BANK IN DALLAS IN OPPOSITION

OPINIONS BELOW

The District Court filed no opinion. The opinion of the Court of Appeals for the Fifth Circuit (App. A of Petition) is reported at 393 F.2d 371.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 21, 1968. A petition for re-

hearing was denied on June 14, 1968. The petition for writ of certiorari was filed on September 12, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that the District Court's instructions to the jury did not have the effect of directing a verdict on the issues of fraud and damages.

2. Whether the Court of Appeals correctly held that the District Court's charge submitted the issue of non-disclosure to the jury.

3. Whether the Court of Appeals properly upheld the District Court's action when, during the jury's deliberations at the end of a three week's trial that had produced a transcript of over 2,000 pages and 400 exhibits, the jury inquired if there was "any testimony to indicate" a certain fact, and petitioners requested an instruction "that there was no such testimony in the record" and that the fact was "undisputed," which request the Court refused and instead instructed the jury that it was "the exclusive judge of the evidence."

4. Whether the petitioners may now raise the question of the alleged "bias and prejudice" of the District Judge which they failed to specify as error and present to the Court of Appeals.

5. Whether the findings of the District Court and the Court of Appeals that the evidence was sufficient to support the jury verdict on Kelton's authority are correct.

CONSTITUTIONAL AND PROCEDURAL PROVISIONS INVOLVED

The pertinent Constitutional provision (U. S. CONST. amend. XIV, §1) and procedural provisions (FED. R. CIV. P. 7, 8, 15 and 49) are set forth in the Petition at pp. 5-6.

STATEMENT

1. *Nature of the Case*

Petitioners, Mrs. Cornelia O'Connor Grey ("Mrs. Grey"), James Charles Grey ("James") and Michael Carter Grey ("Michael"), seek review of the unanimous decision of the Court of Appeals affirming the judgment of the District Court which exonerated the First National Bank in Dallas ("Bank")[1] from all alleged wrongdoing.

The suit is based upon an alleged breach of trust by Bank while serving in a fiduciary capacity as trustee and agent for petitioners. Alleging fraudulent representation and concealment of material facts by the Bank, the petitioners sought rescission of a Partition and Sale Agreement ("Agree-

[1] The Greys (petitioners here) sued the Bank not only in its private corporate capacity, but also in its capacity as the Successor Trustee of the testamentary trust of James Charles O'Connor ("O'Connor Trust") and as Successor Trustee of the charitable testamentary trust of Ivor Elizabeth O'Connor Morgan ("Morgan Trust"). Other parties included the Attorney General of the State of Texas ("Attorney General") who, by virtue of Article 4412a, TEX. REV. CIV. STAT. ANN. (1959), is a necessary party in any suit to "nullify or impair the provisions of any instrument . . . affecting a charitable trust."

ment") (I R. 106)[2] under the terms of which they agreed to a partition of several tracts of property and to the purchase by the Bank for $1,155,000 of one of the tracts, the A'Mell Building. The A'Mell Building, together with other property in an entire city block, Block 60, was to be and has been used by the Bank as the site for its new banking house and fifty-two story office building. The suit also sought to avoid the effect of a final State Court judgment (I R. 124) which confirmed and approved the transaction complained of by petitioners, relieved the Bank, as trustee, from all self-dealing and other restrictions that would otherwise have prohibited the transaction contemplated, and authorized all parties to consummate the partition and sale.

2. *The Partition and Sale*

The record reveals that as soon as the Bank decided to attempt acquisition of Block 60 for its new quarters, it communicated its desire to the beneficiaries (petitioners here) and offered to resign as trustee (II R. 765-68, 851-52; P-22, V R. 69; D-8, VII R. 589). Following rejection of its offer to resign, the Bank proceeded to furnish the petitioners with relevant information to assist them in determining a price

[2] The record in the Court of Appeals which was certified to this Court will be cited "R" preceded by the number of the printed volume. Plaintiffs' exhibits cited herein will be designated by the letter "P" followed by the specific exhibit number and a citation to the volume and page of the printed record where that exhibit appears, such as P-22, V R. 69. Defendant Bank's exhibits will be designated by the letter "D," and the O'Connor Trust's exhibits will be designated by "O'Connor," followed by their number and volume citation.

The transcript of the State Court proceedings marked in the District Court as Defendant's Exhibit 127 which was part of the record in the Court of Appeals, but not printed, will be cited "Record on Appeal, D-127" followed by the page reference.

to ask for the subject property (II R. 993-94; III R. 1168-69, 1172; P-23, V R. 71; D-12, VII R. 592; D-13, VII R. 593; D-125, VII R. 823).

The Bank's disclosure of its interest in acquiring the property was made in April, 1960. At that time Mrs. Grey and her counsel were agreeable in principle to the Bank's acquiring the property provided the price could be agreed on and provided the property could be partitioned to the charitable Morgan Trust so that the sale would be made by that trust to the Bank (III R. 1163-65). Mrs. Grey was not, however, unfamiliar with the value of the A'Mell Building. Prior to its concern with Block 60 as a new building site, Bank had, in October 1959, furnished Mrs. Grey with the 1959 Dallas Real Estate Board appraisals of the eight properties she held jointly with the O'Connor and Morgan Trusts (P-237, VI R. 547). She had agreed to have such appraisals made in connection with a pending voluntary partition of the properties between her, the O'Connor Trust and the Morgan Trust. One of these, the A'Mell Building, was appraised at $500,000 (P-236, VI R. 545-46).

The petitioners did not, however, depend on Bank alone for information. They were advised by their attorney, Mr. Leo P. Dorsey of the New York bar, who had "considerable experience in real estate" (III R. 1139), and also they had assistance from their accountants Messrs. Wendell and Dreher, and various other "financial advisors" (P-231, VI R. 532; D-144, VII R. 868; D-145, VII R. 870). Among them was Mr. Robert R. Ferguson, Vice President and Trust Officer of the Republic National Bank of Dallas, a competitor of the Bank, which planned to succeed it in the management

of Mrs. Grey's agency account (P-231, VI R. 532; D-144, VII R. 868).

After almost five months' consideration, and after rejecting a second offer of the Bank to resign as trustee of both trusts (III R. 1169, 1264), petitioners submitted to the Bank on September 14, 1960 their price of $1,155,000. The Bank promptly agreed to pay such price, although it was more than twice the Dallas Real Estate Board appraisal (III R. 1022). In determining the price to ask for the property, the petitioners by their own declaration had the Bank "over the barrel" (III R. 1181; D-141, VII R. 864). To afford the petitioners certain income tax advantages, it was also agreed that the purchase of the A'Mell Building would be made from the charitable Morgan Trust after the partition.

Promptly after the execution of the Agreement, the Attorney General of the State of Texas was furnished a copy and was informed of the proposed transaction (P-268, VII R. 576). He conducted a completely independent investigation of the matter (III R. 1474-81). Pursuant to the provisions of the Agreement, suit was filed in the State District Court seeking approval of the transaction. The petitioners as well as the Attorney General were named parties to that suit. After a day's hearing at which the testimony of a number of witnesses, including two independent realtors on value, was presented, the court approved and confirmed the Agreement (Record on Appeal, D-127). Not until the conclusion of the evidence in that hearing did the Attorney General give his consent to the transaction. As

to the Attorney General's position in the State Court hearing, Assistant Attorney General Ben H. Harrison, Esquire, testified:

> "I stood up and said that it was the Atorney General's opinion that it was a fair and just partition as far as the charitable trust was concerned, and thought the consideration was adequate for the charitable interest, and therefore, joined in the petition of the Bank to approve the partition agreement, and asked leave of the court to file this proceeding, and the court granted leave . . ." (III R. 1481).

Pleadings by the Attorney General consenting to the transaction were thus filed in the case only after all evidence was in (III R. 1491).

Contrary to the petitioners' characterization of the State Court proceedings as a "mock hearing" (I R. 83), the State trial judge expressed his opinion at the conclusion of the trial as follows:

> "It occurs to me that there has been a more than fair disclosure. It has been a very well and thoroughly developed case" (Record on Appeal, D-127: p. 82).

Although the Attorney General has been a party to the present suit since it was filed in the District Court (III R. 1485) and had the benefit of all the so-called "discovery of fraud" unearthed by petitioners in discovery proceedings, he did not lend his support to the petitioners in their efforts to obtain rescission or damages.

3. *Proceedings Below*

The final test of fairness came in the District Court below when, after three weeks of trial, the court and a jury

both approved the Agreement and the procedures consummating it.

In its charge the District Court instructed the jury that the Agreement was conditioned upon its approval by the State Court in a proceeding in which the petitioners and Attorney General were parties (I R. 290); that the petitioners contended "the Bank as Agent and Trustee violated its fiduciary duties in the negotiations leading to the agreement and to the State Court Judgment" in that the Bank "made certain material representations which were false and concealed certain material facts" and petitioners "ask for money damages" (I R. 291); and that, "As to the State Court case, it was the contention of James C. Grey and Michael C. Grey that they did not authorize the employment of Philip Kelton to represent them in said case" (I R. 291).

The independence of the fraud issues from the issue relating to Kelton's authority is manifest by the District Court's instruction to the jury that:

> "The issues in this case for your decision are: (1) *Whether the First National Bank in its individual capacity misrepresented or concealed material facts which were relied on to the damage of Plaintiffs* (2) whether the partition and sale agreement was later ratified by Mrs. Grey, Michael or James Grey with full knowledge of the facts and their legal rights (3) *whether Mr. Kelton was authorized to represent James and Michael Grey in the State Court case,* and (4) whether James and Michael Grey consented to the entry of judg-

ment in the State Court" (I R. 292). (Emphasis added.)[3]

It was in light of the foregoing instructions that the Court of Appeals in considering petitioners' claim "that the court's instruction that Mrs. Grey was bound by the state court judgment and that James and Michael were likewise bound unless the jury found that they had not authorized Kelton

[3] Accordingly, the first three issues the District Court submitted to the jury were (I R. 297-98):

"Special Issue No. 1

"Do you find by a preponderance of the evidence that Philip Kelton did not have authority to represent James C. Grey or Michael C. Grey in the case of First National Bank against Cornelia O'Connor Grey et al, in the 116th Judicial District Court, Dallas County, Texas?

"Answer as to each party, 'He was not authorized' or 'He was authorized.'

James C. Grey	He was Authorized
Michael C. Grey	He was Authorized

"Special Issue No. 2

"Do you find from a preponderance of the evidence that the First National Bank in furnishing information to Mrs. Grey, James Grey, and Michael Grey leading to the partition and sale agreement of September 19, 1960 and the judgment of the State Court of November 28, 1960 made any material misrepresentations?

"Answer 'yes' or 'no' as to each party.

Mrs. Grey	No
James C. Grey	No
Michael C. Grey	No

"Special Issue No. 3

"Do you find from a preponderance of the evidence that the First National Bank in the negotiations with Mrs. Grey, James Grey, and Michael Grey leading to partition and sale agreement of September 19, 1960 and the judgment of the State Court of November 28, 1960 concealed any material facts?

"Answer 'yes' or 'no' as to each party.

Mrs. Grey	No
James C. Grey	No
Michael C. Grey	No

The issues relating to fraud, Special Issues Nos. 2 and 3, are completely independent and in no way conditioned upon an affirmative finding to Special Issue No. 1 that Kelton "was authorized."

to represent them was tantamount to instructing a verdict for First National on the issues of fraud and damage" (App. 16a, 393 F.2d at 382), concluded that:

> "The court's charge, taken as a whole, shows that the issue of the state court's jurisdiction was completely separate from the issue of whether First National fraudulently obtained that judgment. The distinction is also clear from the special interrogatories: Special Issue No. 1 went to Kelton's authority; Special Issues Nos. 2 and 3 to the alleged concealment or misrepresention. We therefore see no basis for appellants' contention that the jury might have believed that if it answered 'yes' as to Kelton's authority, it was bound to answer 'no' as to fraud" (App. 16a, 393 F.2d at 382).

Petitioners also contended below that the District Court failed to submit an issue to the jury on the Bank's alleged failure to disclose. Viewing the District Court's charge that advised the jury of the Bank's position as a fiduciary with respect to petitioners (I R. 290), and that the Bank therefore had "a duty to impart . . . all material facts in dealings" with petitioners (I R. 294-95), and that the petitioners contended Bank had "violated its fiduciary duties" (I R. 291), although the Bank "denies that it misrepresented or concealed any material facts, contending . . . it made a full disclosure of all material facts" (I R. 291), the Court of Appeals was constrained to hold that:

> "Considered as a whole, we find that the court did charge the jury that an issue was First National's failure to disclose" (App. 14a, 393 F.2d at 381).

Shortly after the jury began its deliberations, the jury sent the following inquiry to the District Court:

> "Was their [sic] any testimony to indicate whether the bank told Mrs. Grey or her attorney that Mr. Majors owed the First National Bank $650,000.00 on The Republic Garage Building" (I R. 362-63).

Thereupon, petitioners' counsel below requested the District Court to instruct the jury that there was "no such testimony in the record" and that it was "undisputed" that the Bank had not advised Mrs. Grey or Mr. Dorsey of the Majors' loan (I R. 363). The District Court, in response to the question, advised the jury that it was "the exclusive judge of the evidence" (I R. 364).

The problems inherent in the response by the District Court to the jury's inquiry were appreciated by the Court of Appeals:

> "In order to answer the question on the merits, the judge would have had to review over 2,000 pages of transcript and 400 exhibits and, in the absence of direct testimony, draw an inference as to the proper answer. This would have been an insurmountable burden. As an alternative, the judge could simply have tried to recall the evidence and evaluate its significance, but in so doing she would have been acting as a 13th juror" (App. 24a. 393 F.2d at 386).

Accordingly, the District Court's answer was "an appropriate one" (App. 24a, 393 F.2d at 386).

The verdict of the jury that Kelton was authorized to represent James and Michael in the State Court proceeding is supported by abundant evidence: Paragraph 5.06 of the

Agreement (I R. 117) obligated the Bank, as trustee of the O'Connor Trust, to "retain such counsel to represent it in such proceeding as is recommended by Mrs. Grey and the Remaindermen, and to file such answer in such proceeding as is recommended by such counsel . . . ." The petitioners, therefore, had the contractual right to select counsel for the O'Connor Trust. They were afforded such right of selection. Mr. Dorsey testified:

> "Again, the bank told us that we could obtain any counsel that we wanted to, but our position was that we did not want to pick out any counsel, we wanted this deal to go through, and therefore, any counsel that the bank picked out would be satisfactory to Mrs. Grey and to the two boys" (III R. 1188).

The Agreement was signed by Mrs. Grey and James in New York on September 19, 1960. Mrs. Grey was to take a counterpart of the Agreement with her to Paris, France, and obtain the signature of Michael. However, as late as October 10, 1960, the Bank had not received the counterpart of the Agreement signed by Michael and the petitioners had not suggested nor approved any attorney to represent the O'Connor Trust in the forthcoming State Court proceeding. Neither had the petitioners chosen an attorney to represent themselves individually.[4] Time was running out.

[4] The Agreement obligated Mrs. Grey promptly to file an answer in the State Court proceeding asking that the Agreement be approved and confirmed and that the relief sought by the Bank be granted (I R. 116). It also required Mrs. Grey to recommend to James and Michael that they file a similar answer in the proceeding. James and Michael each approved, ratified and adopted the Agreement "with the same force and effect as if he were a party thereto" (I R. 123-24). All parties had agreed to "cooperate in consummating this agreement in the most expeditious manner practicable" (I R. 118).

The contract required that the transaction contemplated be completed by December 31, 1960. Bank's counsel, on October 10, 1960, wrote Mr. Dorsey a letter suggesting that "if it is agreeable to you and Mrs. Grey" it would seem that Mr. Kelton, in view of his firm's previous representation of the trust, "would be an appropriate person to represent the O'Connor Trust in the court proceeding" (P-90, V R. 241). Mr. Dorsey responded to Bank's counsel's letter on October 13, 1960 (D-21, VII R. 612) stating:

> "I am sure that Mr. Phil Kelton of the firm of Strasburger, Price, Kelton, Miller & Martin, Esqs. is agreeable to Mrs. Grey, as well as myself, to represent the O'Connor Trust in the proceeding."

Mr. Kelton then called Mr. Dorsey on the telephone and inquirred "if he were authorized to represent Mrs. Grey and the two boys" (III R. 1190). Mr. Dorsey's reply was "yes, unquestionably" (III R. 1190). Thereafter, Mr. Dorsey, by letter dated November 9, 1960, advised Mrs. Grey:

> "Since Mr. Kelton had represented the O'Connor Trust previously, I authorized him to represent the O'Connor Trust and yourself and James and Michael in the A'Mell Building petition matter" (O'Connor-1, VIII R. 1135).

The petitioners were a "very closely knit" family and when separated corresponded with one another frequently (II R. 562; III R. 1285). They were all together in Paris, France, when Mrs. Grey received Mr. Dorsey's letter of November 9, 1960, informing her that he had employed Mr. Kelton to represent her, James and Michael in the State Court proceeding and had also approved Mr. Kelton's representation of the O'Connor Trust in that proceeding

(II R. 564, 583). That Mrs. Grey had the authority from her sons to do whatever was necessary to consummate the Agreement is made clear by her testimony in the District Court.[5] Michael admitted that he never disagreed with his mother about "handling of the Dallas property" (II R. 575).[6] In view of their arrangement it is understandable that when Mrs. Grey presented the Agreement to Michael to sign they discussed it but he didn't have any questions about it. He just said "Where do I sign" (III R. 1285). Mrs. Grey had recommended to Michael that he file an answer in the State Court proceeding and he had agreed to do whatever she wanted (II R. 585-88). Michael also admitted that his

[5] Mrs. Grey testified:

"Q. They [boys] loved you dearly, didn't they?

"A. Yes.

"Q. And anything you wanted, that is what they wanted, wasn't it?

"A. Just about, yes.

"Q. And they really left things to you, you had to do it, didn't you?

"A. Yes" (III R. 1389).

Mrs. Grey also testified:

"Q. Did they [boys] leave all of the management and the handling of these properties to you, Mrs. Grey?

"A. Well, I would say that as little as they knew they practically had to.

"Q. Well, did they, in fact?

"A. In fact, yes.

"Q. And it is true that whatever was done with respect to the Dallas properties was by and through you?

"A. That's right" (III R. 1296).

[6] Michael testified:

"Q. Is it true, sir, that from the beginning of time you had never disagreed with your mother about the handling of the Dallas property?

"A. I never argued with her about it. She never talked much about it — I never talked with her much about it.

"Q. Have you ever disagreed with her, sir?

"A. Not to my recollection" (II R. 575).

mother had told him that Mr. Dorsey was representing "the family interests" (II R. 570). It was shown Michael testified in his deposition, with respect to Mr. Dorsey, that "I knew he was taking care of our case" (II R. 571). It was also shown that Michael, in his deposition, had testified (II R. 572):

> " 'ANSWER: Yes, I believed Dorsey was handling the family interests, my brother's and mine and mother's at the same time.'
>
> "Q. Didn't you so testify?
>
> "A. I did so testify."

The evidence with respect to James on the question of Mr. Kelton's authority to represent him in the State Court is even more overwhelming. James was personally present and participated in the September 1960 week of negotiations in Dallas, leading up to the execution of the Agreement. Mr. Dorsey purported to speak for the family (III R. 1168, 1170, 1181, 1184-85; III R. 1322). James never denied this authority.

On the return trip from Dallas to New York, Mr. Dorsey went over the Agreement with Mrs. Grey and then took a seat beside James and reviewed the Agreement with him including a discussion of the prospective State Court action (III R. 1232-35). Prior to Mrs. Grey's return to Paris, and in the presence of James, she directed Mr. Dorsey to send all correspondence to her concerning the A'Mell Building transaction and "she would take it up with the boys" (III R. 1198). There was no objection from James. It was shown that James testified in his deposition that, "I thought because he [Mr. Dorsey] represented my mother he repre-

sented me, because we were all of the same family" (IV R. 1753-54).

James and Michael each acknowledged that Mr. Dorsey was their attorney on the McClanahan Trust matter which dated back to 1956 and continued until February 1961 (II R. 518; III R. 1457; IV R. 1715). During the summer of 1960, Mr. Dorsey represented them in connection with investigating the abandonment by a trustee of some Florida lands (III R. 1137-38). Mr. Dorsey also represented Mrs. Grey and James (and perhaps Michael) concerning a trust intended to give James (and perhaps Michael) certain income (III R. 1138; IV R. 1709).

A review of the entire record demonstrates that Mr. Dorsey was the "family counselor."

ARGUMENT

I

THE DISTRICT COURT'S INSTRUCTION AS TO THE EFFECT OF THE STATE COURT JUDGMENT DID NOT DIRECT THE JURY TO FIND IN FAVOR OF THE BANK ON FRAUD AND DAMAGE ISSUES, AND THE COURT OF APPEALS' HOLDING TO THAT EFFECT IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *CALLEN v. PENNSYLVANIA R.R.*, 322 U.S. 625 (1948)

Petitioners contend that the District Court's instruction that Mrs. Grey was "bound" by the State Court judgment and that James and Michael were likewise "bound" unless the jury found Kelton lacked authority to act for them in

that suit,[7] was tantamount to instructing a verdict in Bank's favor on all fraud and damage issues.[8] The Court below rejected this argument holding that the charge, taken as a whole, shows that the issue of the State Court's jurisdiction was completely separate from the issue of whether Bank fraudulently obtained that judgment (App. 16a, 393 F.2d at 382). On the facts of the present case (see "Statement," *supra* at 8-10) the decision of the Court of Appeals was manifestly correct.

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[7] The instruction complained of reads as follows:

> "Insofar as the State Court case is concerned Mrs. Grey, individually, and as a beneficiary of the O'Connor Trust, the Morgan Trust, and the Attorney General are bound by the Judgment approving the partition and sale of the properties here concerned. If you find by a preponderance of the evidence that Philip Kelton did not have authority to act for James C. or Michael C. Grey, they will not be bound by the State Court Judgment, and the partition and sale will not be effective as to them as Remaindermen of the O'Connor Trust, unless the entry of judgment was consented to by them or the partition and sale agreement was later ratified by them" (I R. 292).

[8] Framed as a direct attack, petitioners' first count of their complaint (I R. 4) seeks to avoid the *res judicata* effect of the final State Court judgment by alleging fraud in its procurement. However, under settled Texas law a prior judgment can be set aside only if the fraud alleged and proved is of an "extrinsic" nature. Alexander v. Hagedorn, 148 Tex. 565, 226 S.W.2d 996 (1950); Bankston v. Bankston, 251 S.W.2d 768 (Tex. Civ. App. 1952, mandamus overruled).

The issues raised in petitioners' first count are essentially the same as those determined by the State Court some years earlier. By motion to dismiss filed in the District Court and by counterpoint in the Court of Appeals, the Bank questioned the petitioners' right to relitigate the same facts under the guise of a direct attack. Its position was then, and is now, that the allegations did not constitute extrinsic fraud, but only matters intrinsic to the former proceeding and hence was an attempt to retry the earlier case. The Court of Appeals failed to reach this issue "since the jury found that the state court judgment was not procured by fraud" (App. 12a n.8; 393 F.2d at 380 n.8).

Petitioners also assert that the holding of the Court of Appeals on this point is in conflict with this Court's decision in *Callen v. Pennsylvania R.R.*, 332 U.S. 625 (1948). The case under consideration is distinguishable on its facts and there is no conflict with *Callen*.

In *Callen*, the plaintiff, a railroad brakeman, brought an action under the Federal Employers Liability Act to recover for alleged permanent injuries received in the course of his employment. The defendant railroad denied negligence and pleaded a general release. It was undisputed that for a consideration of $250 the plaintiff executed a general release. However, the validity of this release was drawn into question and was litigated on grounds of mutual mistake as to the extent of the plaintiff's injury. Nevertheless, in instructing the jury, the trial court stated (332 U.S. at 627-28):

> "Anyhow, they settled to the extent of $250.00, and the release has been offered in evidence and admitted, and *both sides agree that that release was not in contemplation of any sort of permanent injury.*
>
> * * *
>
> "The release, as I have told the attorneys for both sides, I do not consider binding insofar as it applies to his permanent injuries, *because the Pennsylvania Railroad certainly didn't know he was permanently injured* ..." (Emphasis added.)

It was in light of the foregoing instructions that this Court affirmed the lower court holding that "The Circuit Court

of Appeals quite rightly . . . construed the charge of the District Judge as withdrawing the question of validity of the release from the jury" (332 U.S. at 628).*

The particular set of facts here presented differs from those in *Callen* and the holding of the Court below does not conflict with this Court's decision in that case.

II

THE HOLDING OF THE COURT BELOW THAT THE DISTRICT COURT'S CHARGE PROPERLY SUBMITTED ALL OF PETITIONERS' CLAIMS TO THE JURY IS MANIFESTLY CORRECT AND IS NOT IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL

Petitioners contend that the District Court's charge to the jury failed to submit the issue of nondisclosure separately from the issues of misrepresentation and concealment. As shown in the "Statement," *supra* at 10, the District Court's charge, considered as a whole, did submit the question of the Bank's alleged failure to disclose to the jury.

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* Moreover, it was "apparent that the jury accepted the instructions of the court on the subject of the release," 332 U.S. at 629, because, in light of the court's instruction,

> "Now, I am going to consider that release as binding to the amount of $250.00, and if you find a verdict for the plaintiff you will deduct that from any amount you would otherwise give him" (332 U.S. at 627-28),

the jury returned and rendered a verdict: "For the plaintiff, and assess[ed] the damages at $25,240, of which the railroad is to be reimbursed with $250.00" (322 U.S. at 629).

Furthermore, it did so in keeping with the language used by petitioners in their pleadings. As the Court below aptly noted:

> "Moreover, in examining the record we find that appellants themselves were not always conscious of a difference between misrepresentation and concealment, on the one hand, and failure to disclose, on the other. Thus in Paragraph 19 of their complaint they stated, 'Bank was under a *duty to disclose* to plaintiffs each and all of the facts alleged in paragraph 18 hereof, and by *concealing the same* . . .' (emphasis added). The same phraseology is utilized in Paragraphs 22 and 56, and if appellants may use the terms interchangeably, they should not be heard to complain if the court does also" (App. 15a; 393 F. 2d at 381-83).[10]

Under Texas law, "It is recognized that silence, where the party is under a duty to speak, may amount to a concealment." *Alco Oil & Gas Corp. v. Concord Oil Co.*, 375 S.W.2d 463, 466 (Tex. Civ. App. 1964), *aff'd*, 387 S.W.2d 635 (1965). To the same effect are *Chandler v. Butler*, 284 S.W.2d 388, 395 (Tex. Civ. App. 1955, no writ); *Phillips Petroleum Co. v. Daniel Motor Co.*, 149 S.W.2d 979, 988 (Tex. Civ. App. 1941, writ dism'd, judgm't cor.).

Petitioners also assert that the decision in the instant case is in conflict with the decisions of the Seventh Circuit in *Tilman v. Great American Indem. Co.*[11] and in *Mickey v.*

[10] The examples cited by the Court below are not isolated ones. See for example Paragraph 29 (I R. 54); Paragraph 57 (I R. 69); Paragraph 59(a), (b), (c), (d), (e), (f), (h), (j) (I R. 70-78); Paragraphs 60 and 61 (I R. 78); Paragraph 62 (I R. 79); Paragraph 64 (I R. 80), Paragraph 93 (I R. 92); Paragraph 112 (I R. 100).

[11] 207 F.2d 588 (7th Cir. 1953).

Tremco Mfg. Co.[12] and with the decision of the Ninth Circuit in *Palmiero v. Spada Distrib. Co.*,[13] holding that all issues raised by the pleadings should be submitted to the jury. The District Court below did submit all petitioners' theories of recovery and did so in the same language used by petitioners. There is no conflict of decision.

III

THE SUPPLEMENTAL INSTRUCTION REQUESTED BY PETITIONERS WOULD HAVE CONSTITUTED A COMMENT ON THE EVIDENCE AND WAS PROPERLY REFUSED

When the jury asked the District Court if there was any testimony to indicate whether the Bank had told Mrs. Grey or her attorney about the existence of a loan to Mr. Majors, petitioners requested the Court to advise the jury "that there was no such testimony in the record" and that it was "undisputed" that the Bank did not tell Mrs. Grey or her attorney of the loan's existence. The requested instruction, if given, would have constituted a comment upon the evidence. Furthermore, it would have conflicted with the stipulation that the Bank had told Mrs. Grey's attorney about the loan on August 21, 1961 (Stipulation, VII R. 1152).[14]

[12] 226 F.2d 956 (7th Cir. 1955).

[13] 217 F.2d 561 (9th Cir. 1954).

[14] The jury's note does not inquire as of a certain date. When Mrs. Grey's New York counsel, Leon Alexandroff and Neil A. Pollio, came to Dallas in August 1961 to investigate Mr. Dorsey's representation of Mrs. Grey, voluminous documents were furnished them by the Bank. These items included Majors' loan application (P-110, V R. 278), Majors' liability ledger (P-127, P-127(a), VI R. 40-41) and Majors' collateral ledger (P-127(c), VI R. 343).

Petitioners also assert that the pleadings furnish a basis for the District Court to have instructed the jury as requested since Bank "admitted" in its Answer "that it had not made disclosure to Mrs. Grey or her attorney of Majors' indebtedness to it secured by the Republic Garage Building" (Petition, p. 15). Examination of the pleadings will not, however, support that position. Paragraph 55(a) of the Complaint (I R. 65), cited by Petitioners in support of their request (I R. 363), refers to the acquisition by Z. L. Majors, Trustee, of the A'Mell Building, and **not the Republic Garage Building** that the jury inquired about. The Bank answered this allegation by stating it was "without knowledge or information sufficient to admit or deny" (I R. 187).

On the basis of the foregoing the Court's reply was proper.

Petitioners also claim a conflict in decision between the Court below and the holding of the Seventh Circuit in the criminal case of *United States v. Jackson*, 257 F.2d 41 (7th Cir. 1958).[15] In *Jackson*, the jury, during its deliberation, asked the court if a certain witness was a government employee. The trial judge "said that he did not remember" and "the jury, therefore, was sent back to resume its deliberations without any answer to its question," 257 F.2d 42. Thereupon, counsel for the accused requested "that those parts of the transcript dealing with this question be read to the

[15] We also note that the two cases cited by petitioners as following *Jackson*, United States v. Fiorito, 300 F.2d 424 (7th Cir. 1962) and Gregory v. United States, 365 F.2d 203 (8th Cir. 1966), were likewise criminal cases.

jury," 257 F.2d 43. The trial court failed to honor the request. The Court of Appeals reversed the defendant's conviction, holding that:

> "In view of the circumstances present in this case, we think that the failure to permit the reading of the relevant testimony at a time when it would have been useful in the jury's deliberations created unfairness to the defendant" (257 F.2d at 43).

Petitioners, however, made no request that any testimony be read to the jury. The *Jackson* case is therefore not in point. Furthermore, as stated by the Court below, the failure of petitioners' counsel to request the Court to instruct the jury concerning the reading of testimony precludes consideration of that point:

> "Appellants argue that at least the trial judge should have instructed the jury that it had a right to request any portion of the testimony to be read to it in open court by a court reporter. *We need not now consider this objection since appellants did not request such an instruction below*" (App. 24a; 393 F.2d at 386). (Emphasis added.)

IV

SINCE PETITIONERS DID NOT SPECIFY AS ERROR IN THE COURT BELOW THE ALLEGED "BIAS AND PREJUDICE" OF THE DISTRICT JUDGE, PETITIONERS ARE PRECLUDED FROM RAISING THE POINT FOR THE FIRST TIME BEFORE THIS COURT

Petitioners' "Specifications of Error" (Appellants' Brief, pp. 30-32) in the Court of Appeals makes no mention of

the alleged "bias and prejudice" on the part of the District Judge. Since this point was not assigned as error on the appeal to the Court of Appeals and was not presented and passed on there, it cannot be raised for the first time before this Court. *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958); *Husty v. United States*, 282 U.S. 694, 701-02 (1931); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

Furthermore, petitioners failed to file a "timely and sufficient affidavit" that the District Judge had "a personal bias or prejudice" against them as required by 28 U.S.C. §144. The remarks of the District Judge, carefully selected for quotation by the petitioners, took place at a Pre-Trial Conference held some nine months prior to trial.

Even if considered on the merits, the remarks of the District Judge do not reflect a "predetermination of crucial issues" as petitioners allege (Petition, p. 28). Taken in context they show a respectful attempt on the part of the District Judge at a "simplification of the issues" as authorized by Rule 16 of the Federal Rules of Civil Procedure (see IV R. 1808-18).

V

THE FINDING OF THE JURY THAT KELTON WAS AUTHORIZED TO REPRESENT JAMES AND MICHAEL IN THE STATE COURT IS SUFFICIENTLY SUPPORTED BY THE EVIDENCE

Review is also sought by petitioners of the jury's verdict that attorney Kelton had authority to represent James and Michael in the State Court.[16] The correctness of the jury's finding turns solely upon an analysis of the particular facts involved (see "Statement," *supra* at 11-16). The District Court found sufficient evidence to support the jury's finding when it overruled (I R. 381) petitioners' motion for judgment *non obstanto verdicto* (I R. 368). The Court of Appeals affirmed (App. 17a-21a; 393 F.2d at 383-85). It has not been the practice of this Court to grant a certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925). No important question of Federal law is here present.

[16] Petitioners also make the claim here, but not assigned as error in the Courts below, that Kelton was disqualified from representing the O'Connor Trust and its beneficiaries (petitioners here) in the State Court proceeding because of the inherent "conflicting interests" (Petition, pp. 32-33). Petitioners overlook the fact that Mrs. Grey (and in all probability James and Michael) were made aware of this so-called "conflict" and raised no objection. By letter dated November 9, 1960, Mr. Dorsey advised Mrs. Grey:

> "Since Mr. Kelton had represented the O'Connor Trust previously, I authorized him to represent the O'Connor Trust and yourself and James and Michael in the A'Mell Building petition matter" (O'Connor-1, VIII R. 1135).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

United States Code

Title 28, Section 144:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Texas Revised Civil Statutes

Article 4412a, Section 2:

> For and on behalf of the interests of the general public of this state in such matters, the Attorney General shall be a necessary party to and shall be served with process, as hereinafter provided, in any suit or judicial proceeding, the object of which is:
>
> a. To terminate a charitable trust or to distribute its assets to other than charitable donees, or
>
> b. To depart from the objects of a charitable trust as the same are set forth in the instrument creating the trust, including any proceedings for the application of the doctrine of cy pres, or

c. To construe, nullify or impair the provisions of any instrument, testamentary or otherwise, creating or affecting a charitable trust, or

d. To contest or set aside the probate of an alleged will by the terms of which any money, property or other thing of value is given, devised or bequeathed for charitable purposes.

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No. 513

In the

Supreme Court of the United States

OCTOBER TERM 1968

CORNELIA O'CONNOR GREY, JAMES CHARLES GREY and MICHAEL CARTER GREY,

Petitioners,

v.

FIRST NATIONAL BANK IN DALLAS, ET AL.,

Respondents.

BRIEF OF FIRST NATIONAL BANK IN DALLAS, TRUSTEE OF THE IVOR O'CONNOR MORGAN TRUST, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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BRIEF OF FIRST NATIONAL BANK IN DALLAS, TRUSTEE OF THE IVOR O'CONNOR MORGAN TRUST, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

First National Bank in Dallas, Trustee of the Ivor O'Connor Morgan Trust, one of the Respondents, files its Brief in Opposition to the Petition for Writ of Certiorari, filed herein by the Petitioners, Cornelia O'Connor Grey, James C. Grey and Michael C. Grey.

OPINIONS BELOW

The statement of the Opinions Below set forth in the Petition of Writ of Certiorari is correct except that the trial was before the United States District Court for the *Northern* District of Texas, Dallas Division (Hon.

Sarah T. Hughes) and not the *Southern* District as stated.

JURISDICTION

The jurisdiction of the Supreme Court of the United States under Title 28, U.S.C., Sec. 1254(1) is admitted.

QUESTIONS PRESENTED

Question 1 (Petition Pages 2 and 3) does *not* fairly state the point in that it fails to show that the trial court did charge the jury on the issue of the Bank's failure to disclose in that the charge stated "it is the contention of Plaintiffs that the Bank as Agent and Trustee violated its fiduciary duties * * * and that the First National Bank denies that it misrepresented or concealed any material facts, contending on the other hand that it made a full disclosure of all material facts," and further stated that "there must be fair dealing and good faith by the Trustee toward the beneficiary" and that the "Trustee * * * has a duty to impart to the beneficiary all material facts in dealings between the Trustee and the beneficiary." The complete charge to the jury on this point is as follows:

> "You are further instructed that the relationship of principal and agent is fiduciary in nature and therefore the agent is required to be loyal and to act in good faith. The Agent must be fair and honest in all the dealings with his principal, and the Agent has the duty of imparting to his principal, every material fact relating to a transaction, if in the scope of the agency, on becoming aware of such facts during the course of the transaction.

"The First National Bank, in addition to being the agent of Mrs. Grey, was the Trustee of the O'Connor Trust, of which Mrs. Grey was the beneficiary, and James C. and Michael C. Grey were the Remaindermen-beneficiaries.

* * *

"You are instructed that the Trustee of a Trust occupies the position of a fiduciary of the Trust, that is, there must be fair dealing and good faith by the Trustee toward the beneficiary. The Trustee has the duty to act in the best interests of the beneficiary of the Trust, and has a duty to impart to the beneficiary all material facts in dealings between the Trustee and the beneficiary." (IR 294-295)

Question 2 (Petition Page 3) does not fairly state the point in that it fails to show that the trial court charged that "the Trustee of a Trust occupies the position of a fiduciary of the Trust that there must be fair dealing and good faith by the Trustee toward the beneficiary. The Trustee has the duty to act in the best interests of the beneficiary of the Trust, and has a duty to impart to the beneficiary all material facts in dealings between the Trustee and the beneficiary." (IR 295)

Question 5 (Petition Page 4) in stating that "such beneficiaries did not authorize such attorney to appear on their behalf * * *" is merely a conclusion and wholly disregards the trial court's instructions on express, implied and apparent authority as applied to the relationship of principal and agent, and on which the jury's answers to special issue Number 1 were based that Philip Kelton was authorized to represent both

James C. Grey and Michael C. Grey in the state court proceeding. Furthermore, due process under the 15th Amendment does not necessarily require personal service of process on a person in such circumstances to bind his interests as a beneficiary of a trust.

STATEMENT

Petitioner's Statement is extremely distorted and argumentative and rather than attempting to point out the distortions and in the interest of brevity, we respectfully refer this Honorable Court to the detailed statement of the evidence by the Court of Appeals. (393 F. 2d 374-379)

REASONS FOR REFUSING THE WRIT

General Reasons

The Petition for Writ of Certiorari clearly fails to present grounds for review under Rule 19 of Rules of the Supreme Court. It does not present "a federal question of substance not theretofore determined by this court", nor "a decision in conflict with another court of appeals on the same matter," nor on an "important state question * * * in conflict with applicable state law," nor a decision on "an important question of federal law which has not been * * * settled by this court," nor a decision on "a federal question in a way in conflict with applicable decisions of this Court," nor a decision which "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

The five reasons stated in the Petition are based primarily on procedural matters on which the decision of the Court of Appeals is final under the federal judicial court structure. This Court does not concern itself with particular issues of justice between individual litigations as distinguished from the general public with its interests of broad scope and range. In *Layne & Bowler Corporation v. Western Well Works* (261 U. S. 387 at 393, 67 L.Ed. 712 at 714) this Court stated:

> ". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

This Court does not exercise its discretionary powers to issue writs of certiorari to correct alleged errors in lower court decisions in such circumstances, nor "give the defeated party in the circuit court of appeals another hearing." *(Magnum Import Company v. Coty*, 262 U. S. 159 at 163, 67 L.Ed. 922 at 924)

A question of importance merely to the litigants and which does not present an issue of public significance does not come within the standards governing the exercise of the Supreme Court's exercise of discretionary power of review by writ of certiorari. The Court in construing Rule 19 in the case of *Rice v. Sioux City Cemetery* (349 U. S. 70 at 73, 99 L.Ed. 897 at 901) stated:

> "This Rule, formulated 30 years ago, embodies the criteria, developed ever since the Evarts Act

of 1891, by which the Court determines whether a particular case merits consideration, with due regard to the proper functioning of the limited reviewing power to which this Court is confined, decisively restricted through the creation of the intermediate Courts of Appeals and more largely confined by the Judiciary Act of 1925. * * *

* * *

"A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (*Magnum Import Co. v. Coty*, 262 U. S. 159, 163, 67 L. Ed. 922, 924, 43 S. Ct. 531; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 Sup. Ct. v, vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc Am Law Inst 313.) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. * * *"

Reply to Petitioners' Reason 1

Petitioners' statements in footnote 8 on page 19 of Petition for Writ of Certiorari that "the record of the State Court hearing is clear that Mrs. Grey and James were prevented by the Bank's failure to disclose facts bearing upon the proposed purchase by it of trust property * * * These facts constituted extrinsic fraud invalidating a judgment * * * constituted fraud upon the state court itself" are not supported by the record. In fact, these same grounds were the basis for one of Petitioners' specifications of error in the Court of Appeals

as reversible error in overruling their motions for directed verdict or for judgment n.o.v. and which specification was expressly denied with the statement "We do not agree." (393 F. 2d 371 at 379 II)

Petitioners' contention that one of the instructions to the jury that Mrs. Grey was bound by the State Court and that James and Michael were likewise bound unless the jury found that they had not authorized Kelton to represent them was tantamount to instructing a verdict for the Bank on the issues of fraud is without merit because the court's charge, taken as a whole, made it clear that the fraud issue related not only to the Partition and Sale Agreement, but also to the entry of the State Court judgment.

The trial court specifically instructed the jury as follows:

> "The issues in this case for your decision are: (1) Whether the First National Bank in its individual capacity misrepresented or concealed material facts which were relied on to the damage of Plaintiffs (2) whether the partition and sale agreement was later ratified by Mrs. Grey, Michael or James Grey with full knowledge of the facts and their legal rights (3) whether Mr. Kelton was authorized to represent James and Michael Grey in the State Court case, and (4) whether James and Michael Grey consented to the entry of judgment in the State Court." (IR, page 292)

The jury specifically answered that Kelton was authorized to represent both James and Michael in the State Court (IR, page 297) and that there was no conceal-

ment or misrepresentation by the Bank to either Mrs. Grey, James or Michael in the Partition and Sale Agreement or the entry of the State Court judgment. (IR, pages 297 and 298)

There is no basis for Petitioners' contention that the jury might have believed that if they answered "yes" as to Kelton's authority, they were bound to answer "no" as to fraud. (393 F. 2d 371 at 382)

The Court of Appeals' decision is not in conflict with the case of *Callen v. Pennsylvania Railroad Company* on this point. The generally accepted rule is that the Supreme Court will not grant certiorari merely to review questions of evidence or fact *(United States v. Johnston* 268 U. S. 220 at 227, 69 L.Ed. 925 at 926). However, recent cases under the Federal Employers' Liability Act have provided a highly argumentative exception to the general rule based upon the rationale that it is not a mere review of the evidence but the importance of the right of trial by jury as specifically provided by the Act *(Rogers v. Missouri Pacific Railroad Company* 352 U. S. 500, 1 L.Ed(2) 493). Clearly, these cases are not representative of the normal certiorari practice and occupy a position of exceptional standing for review. As pointed out in the dissenting opinion by Justice Frankfurter in the *Rogers* case (supra), 352 U. S. 500 at 537, 1 L.Ed. 493 at 527: "In any event, the Court in these four cases has merely reviewed evidence that has already been reviewed by two lower Courts, and in so doing it ignores its own strictures to the bar

that 'We do not grant a certiorari to review evidence and discuss specific facts (authorities cited).'" One of the principal cases cited is *Houston Oil Company v. Goodrich* (245 U. S. 440, 62 L.Ed. 385), which held that the refusal of the trial court, upheld by the Circuit Court of Appeals, to submit certain questions to the jury, will not sustain a writ of certiorari by the Supreme Court where "the propriety of submitting these matters depended essentially upon an appreciation of the evidence."

Reply to Petitioners' Reason 2

Petitioners' contention that trial court's failure to submit special issue, as to trustee's alleged failure to disclose material facts to the beneficiaries, as a basis for writ of certiorari is without merit. The instructions to the jury that it was the contention of Petitioners (Plaintiffs in trial court) "that the Bank as Agent and Trustee violated its fiduciary duties in negotiations leading to the agreement and to the state court judgment" (IR 291), that the Bank "denies that it misrepresented or concealed any material facts, contending on the other hand, that it made a full disclosure of all material facts" (IR 291), that the fiduciary relationship between principal and agent includes "the duty of imparting to his principal every material fact relating to a transaction, if in the scope of the agency, on becoming aware of such facts during the course of the transaction" (IR 294), that the Trustee "has the duty to act in the best inter-

ests of the beneficiary of the Trust, and has the duty to impart to the beneficiary all material facts in dealings between the Trustee and the beneficiary" (IR 295), and that "with respect to what knowledge a Bank as Agent or Trustee has that it would be obligated to disclose to its principal or the beneficiaries of the Trust, if material to a self-dealing transaction, you are instructed that a Bank can only act through its officers and agents, and consequently knowledge acquired by an officer or agent of the Bank is considered to have been known by the Bank so as to be covered by the duty to disclose" (IR 295) clearly encompassed any connotation of bad faith or negative silence; and when considered in the light of the jury answers to special issues 2 and 3, which were answered in the negative individually as to each of the Petitioners, completely refute the alleged error asserted by Petitioners on this point.

When a case is submitted on special verdicts under Rule 49(a), the court should give the jury only such instructions as it deems necessary to enable the jury to make intelligent findings upon the issues submitted. *(Cate v. Good Bros.* 181 F. 2d 146 at 149). As stated by the Court of Appeals in this cause, 393 F.2d 371 at 381 the charge "must be viewed as a whole, in connection with the contentions aired by the parties in the Court below, and it must be viewed from the standpoint of the jury. *Garrett v. Campbell* 360 F. 2d 382 at 386."

Attention is further directed that in said *Garrett* case the court further stated "even if a portion of the charge is technically imperfect if the charge in general correctly instructs, then no harmful error has been committed. * * *" Again, in the case of *Messer v. Foster* 245 F. 2d 412 at 414, it was held that failure to charge expressly in terms of a requested instruction, which was correct as a matter of substantive law, could not be deemed error if the charge as given otherwise adequately instructed the jury on the controlling principles.

Furthermore, there is no conflict between the Court of Appeals' decision and the cases cited in Petitioners' petition herein, because in both the case of *Tilman v. Great American Indemnity Co.* and the case of *Mickey v. Tremco Mfg. Co.*, the general rule is specifically recognized that the trial court has wide discretion as to the form and contents of questions to be submitted and should, especially when requested to do so, submit questions covering all issues raised by the pleadings. The trial court's charge, approved by the Court of Appeals, is not in conflict with the holdings in these cases.

Reply to Petitioners' Reason 3

The trial court's response to the jury's inquiry was proper in view of the circumstances in this case, and it could not be placed in the position of acting as a 13th juror as pointed out by the Court of Appeals.

The court in a recent Texas case *(Aetna Casualty and Surety Company v. Scott* 423 SW 2d 351 at 354, no writ history) in passing on this question stated: "By the very nature of the situation * * * the trial judge is required to exercise judgment and discretion. * * * The statement of facts in this case has more than 100 pages of medical testimony from five doctors. It, of course, had not been reduced to writing at the time the request was made and the task of selecting the portion relevant to the inquiry was not an easy one. Under such circumstances the judge must be given broad discretion and his action held erroneous only where there is an abuse of that discretion with resulting harmful effects." See also: *Standard Supply & Hardware Co. v. Christian-Carpenter Drilling Co.* 183 SW 2d 657 at 663 error refused. These cases should be followed under the doctrine of *Erie Railroad v. Tomkins, 304 U. S. 64, 82 L.Ed. 1118.*

Reply to Petitioners' Reason 4

The insolence and impertinence of the statements made on behalf of Petitioners would justify their being stricken, and they certainly do not warrant the dignity of a reply.

Reply to Petitioners' Reason 5

Petitioners' contention that due process requirements of the 14th Amendment were violated as to James and Michael by reason of their being represented in the State Court proceeding by Kelton is not supportable.

The court's instructions fully apprised the jury of the contentions of the parties as to the authority of Kelton to represent James and Michael (IR 291 and 292) and as to express, implied and apparent authority (IR 293). The jury in answer to Special Issue Number 1 specifically answered "he was authorized" to represent each of them (IR 297) and there is sufficient evidence in the record to support the jury's conclusions as summarized in the opinion of the Court of Appeals (393 F. 2d 371 at 385).

Furthermore, James and Michael had each signed the Partition and Sale Agreement which, according to its terms, was conditioned upon the entering of a judgment in a proceeding to be commenced as soon as possible (IR 114 and 115). This Agreement was sufficient to comply with the notice requirements of Article 7425b-24 of the Revised Civil Statutes of Texas (Texas Trust Act) and Rule 121 of Texas Rules of Civil Procedure as to due process.

The case principally relied upon by Petitioners on this point (*Armstrong v. Manzo* 380 U. S. 545, 14 L.Ed. (2) 62) is clearly distinguishable from the case here under consideration in that as stated in that opinion (380 U. S. 545 at 548, 14 L.Ed(2) 62 at 64), "no notice of any kind was given to the Petitioner of the filing or pendency of this adoption proceeding" and the Court further points out that "Texas law provides that an adoption such as this one shall not be permitted without the written consent of the child's natural father" (380

U. S. 545 at 546, 14 L.Ed. (2) 62 at 63). Where the written consent is executed and filed in the case the non-adopting parent "has all the notice of the adoption proceeding which the law required." *(Pettit v. Engelking* 279 SW 2d 489 at 491 and authorities therein cited).

The jury verdict that Kelton had authority to represent James and Michael in the State Court proceeding is supported by the evidence, and his answer on their behalf was sufficient to dispense with the necessity for issuance and service of any notice upon them.

CONCLUSION

Essentially, Petitioners claim that the values of the properties disclosed to the State Court were false, and that they thereby did not receive a fair price for their property. Of course, these allegations are precisely the same issues which were determined in the State Court judgment after a full day's hearing. Furthermore, Petitioners attempted to re-litigate precisely these same questions in the trial court in this action and this was the basis of the Court of Appeals' ruling herein that the State Court judgment could not be set aside by collateral attack in the Federal Court. *(United States v. Throckmorton* 98 U. S. 61, 25 L.Ed 93) In *Yount-Lee Oil Co. v. Federal Crude Oil Co.* 92 SW 2d 493 (Tex. Civ. App. 1936), the court held on this question that if the complainant "is unable to overcome the effect upon the Court or jury of the evidence offered by his adversary, he cannot, in effect, obtain a retrial of the issue before

another tribunal by charging that the judgment against him was procured by perjury, forgery or false testimony." This latter case holding was cited with approval in the case of *Elder v. Byrd-Frost, Inc.* 110 SW 2d 172 at 175 (Tex. Civ. App. 1937).

The trial court's ruling that no issues or rescission would be submitted to the jury was based upon two grounds; first, that it would be inequitable to do so; and second, that the Partition and Sale Agreement had been approved by a final judgment in the State Court proceeding (IIIR 1471). This ruling necessarily held that the fraud, alleged in connection with the judgment was intrinsic and not *extrinsic* as claimed by Petitioners. (Moore's Federal Practice Vol. 7, 631-635).

This case has been prosecuted on suppositions of fraud and concealment. The facts are that the $1,155,000.00 paid by the Bank was in excess of the reasonable market value of the property at the time, and the Partition and Sale Agreement was entered into after extended negotiations. The Attorney General of the State of Texas approved only after up-to-date appraisals were made by the Dallas Real Estate Board. The sale was consummated only after a full hearing and approval by a final judgment of the State Court. The judgment herein sought to be set aside was based upon a jury verdict after a three-week trial, and which judgment was affirmed by the Court of Appeals for the Fifth Circuit after a thorough review of the entire case.

The Petition for Writ of Certiorari is based primarily on alleged questions of Federal Civil Procedure which are *not* in conflict with decisions of other Courts of Appeals. It does *not* present "a federal question of substance not heretofore determined by this court," nor an "important state question * * * in conflict with applicable state law," nor "an important question of federal law which has not been * * * settled by this court," nor "a federal question in a way in conflict with applicable decisions of this court," nor a decision which "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision," and, therefore, it fails to present grounds for review under Rule 19.

The Petition should be refused.

Respectfully submitted,

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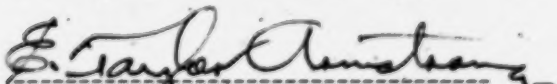

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The foregoing Brief on behalf of Appellee First National Bank in Dallas as Successor Trustee of the Ivor O'Connor Morgan Trust (a charitable trust) is approved and adopted on behalf of Crawford C. Martin, Attorney General of the State of Texas.

Marvin H. Sentell,
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that copies hereof have been served by deposit in the United States Mail, First Class and Air Mail, postage prepaid as required under Rule 33, properly addressed to all counsel of record on this the 11th day of October, 1968.

E. Taylor Armstrong

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No. 513

In the

Supreme Court of the United States

OCTOBER TERM 1968

CORNELIA GREY, JAMES GREY AND MICHAEL GREY,
Petitioners,

v.

FIRST NATIONAL BANK IN DALLAS, ET AL.,
Respondents.

BRIEF OF RESPONDENT FIRST NATIONAL BANK IN DALLAS, SUCCESSOR TRUSTEE OF THE JAMES CHARLES O'CONNOR TRUST, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. .....

In the

Supreme Court of the United States

OCTOBER TERM 1968

CORNELIA GREY, JAMES GREY AND MICHAEL GREY,
Petitioners,

v.

FIRST NATIONAL BANK IN DALLAS, ET AL.,
Respondents.

BRIEF OF RESPONDENT FIRST NATIONAL BANK IN DALLAS, SUCCESSOR TRUSTEE OF THE JAMES CHARLES O'CONNOR TRUST, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

Whether the 1960 state court judgment was subject to the kind of attack made upon it by Petitioners; whether the findings of the jury and the District Court were adequately supported by the record and not clearly erroneous; whether the Petitioners established that they suffered any damage.

STATEMENT OF THE CASE

To avoid burdening the Court with unnecessary repetition, we adopt the statements by the other Respondents

and likewise adopt their Briefs to the extent applicable to this Respondent. We do not accept the statement of Petitioners which is highly slanted, rather than objective, and contains much argumentative material. Likewise, we do not accept the Questions Presented given by Petitioners as being the true questions in the case.

We do think it relevant to set forth the jury's findings, which were as follows:

"SPECIAL ISSUE NO. 1

Do you find by a preponderance of the evidence that Philip Kelton did not have authority to represent James C. Grey or Michael C. Grey in the case of First National Bank against Cornelia O'Connor Grey et al., in the 116th Judicial District Court, Dallas County, Texas?

Answer as to each party, 'He was not authorized' or 'He was authorized'.

JAMES C. GREY He was Authorized.

MICHAEL C. GREY He was authorized.

SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that the First National Bank in furnishing information to Mrs. Grey, James Grey, and Michael Grey leading to the partition and sale agreement of September 19, 1960, and the judgment of the State Court of November 28, 1960, made any material misrepresentations?

Answer 'yes' or 'no' as to each party.

MRS. GREY NO JAMES C. GREY NO
MICHAEL C. GREY NO

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that the First National Bank in the negotiations with Mrs. Grey, James Grey, and Michael Grey leading to the partition and sale agreement of September 19, 1960 and the judgment of the State Court of November 28, 1960, concealed any material facts?

Answer 'yes' or 'no' as to each party.

MRS. GREY NO JAMES C. GREY NO
MICHAEL C. GREY NO

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that Mrs. Grey, James C. Grey, or Michael C. Grey were damaged by such misrepresentations, if any, or concealments, if any?

Answer 'yes' or 'no' as to each party.

MRS. GREY NO JAMES C. GREY NO
MICHAEL C. GREY NO

* * * * *

SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that the First National Bank acted with malice in its actions relating to the partition and sale agreement of September 19, 1960, or in obtaining the Judgment of the State Court of November 28, 1960?

Answer 'yes' or 'no' ANSWER NO

* * * * *

SPECIAL ISSUE NO. 10

Do you find from a preponderance of the evidence that the partition and sale agreement of September 19, 1960, and the Judgment in the State Court were fair

and equitable to Mrs. Grey, James C. and Michael C. Grey?

Answer 'yes' or 'no' as to each party.

MRS. GREY YES JAMES C. GREY YES MICHAEL C. GREY YES

SPECIAL ISSUE NO. 11

Do you find from a preponderance of the evidence that the A'Mell Building had a fair market value in excess of $1,155,000.00 on September 19, 1960?

Answer 'yes' or 'no' ANSWER NO"

* * * * *

SPECIAL ISSUE NO. 13

Do you find from a preponderance of the evidence that the Republic Garage Building property had a fair market value in excess of $650,000.00 on September 19, 1960?

Answer 'yes' or 'no' ANSWER NO

The other issues were conditional and required no answers.

STATUTE INVOLVED

Article 7425(b)-24, Revised Civil Statutes of Texas.

ARGUMENT

1.

This case does not warrant assumption of jurisdiction by the Supreme Court of the United States on certiorari.

This is merely a suit between private parties in which the controverted fact issues were decided against Petitioners

and in favor of Respondents after a full and fair trial. There are no novel or unusual points of law and no supervening questions of public or national importance. There is no conflict with the decision of this Court in *Callen v. Pennsylvania Ry. Co.*, 332 U.S. 725, nor any other cases, the opinion below rather being in accordance with well established law.

2.

Judgment for Respondents was proper herein regardless of any errors claimed by Petitioners because the Motions to Dismiss of Respondents were well taken and the 1960 state court judgment was not subject to the kind of attack made upon it by Petitioners.

The relief sought by Petitioners is barred at the outset by the 1960 judgment of the 116th Judicial District Court of Dallas County, Texas, whose validity they necessarily challenged, asserting it to be void for lack of jurisdiction over James and Michael Grey despite their appearance and answer therein and the express finding of jurisdiction in the judgment.

In general one may not go behind a judgment regular on its face, and the recitals therein must be taken as true in any independent later proceedings. As stated in 34 Tex. Jur. 2d, Judgments, Sec. 325, p. 304, "It is a primary rule in the law of judgments, recognized everywhere, that a judgment of a domestic court of general jurisdiction, rendered in the exercise of its usual powers and regular on

its face, imports absolute verity." Under this rule any defect sought to be asserted in an independent suit must appear on the face of the judgment.

Likewise *Lowman v. Falsetti*, 335 F. 2d 632, states, "The rule in the law of judgments is that a judgment of a domestic court of general jurisdiction, rendered in the exercise of its usual powers, and regular on its face, imports absolute verity."

The federal courts have made some extension of the possible bases of attack by holding that as to a non-resident defendant, the rule of absolute verity cannot be imposed to prevent inquiry into record facts showing lack of jurisdiction. Under this extension the federal court may look not only at the judgment itself but also at the rest of the record in the original case, but it still cannot look behind that record. Thus *O'Boyle v. Bevil*, 259 F. 2d 506, cert. den. 359 U.S. 913, 3 L. Ed. 2d 576, declares:

> "Whatever would be the view of the Texas courts, we think that constitutional requirements of due process require a holding by any court, state or federal, that no such principles of lifting oneself by his own bootstraps can prevent it, in case of a nonresident defendant, from inquiring into *any facts disclosed by the record*. But for the rule of absolute verity we have found that *the record in these two cases discloses* that appellants are denied due process if the judgments are allowed to stand in spite of the procedural defects. Is it any less a denial of due process to hold that a court may by it own fiat declare that requirements were met *which the record discloses* were not in fact met? We think not. * * * It follows, therefore, that as to a nonresident defendant the rule of absolute verity can-

> not be imposed to prevent an inquiry *into the record facts* showing that nonresident service was not legally obtained."

Likewise *Bass v. Hoagland*, 172 F. 2d 205, states:

> "It is also well settled law that its (the judgment's) express recitals import verity. * * * It is equally well settled that such presumptions may be overcome and that recitals as to things proper to be shown in the record on which the judgment rests may be overborne *by reference to that record.*"

Texas cases holding that in an attack upon a judgment lack of jurisdiction can be shown only by the prior record and not by external evidence include *Lewright v. Manning*, 392 S.W. 2d 466 (1965), and *Johnson v. Barnwell Production Co.*, 391 S.W. 2d 776 (1965). Recent cases to that effect from other jurisdictions include *State ex rel. Folds v. Hunt*, 391 S.W. 2d 629 (Tenn., 1965), and *Hambaugh v. Peoples*, 401 P. 2d 776 (1965).

Jurisdiction was questioned by Petitioners only as to James and Michael, and personal jurisdiction over them was not necessary to the validity of the state court judgment. The proceeding in the 116th District Court was brought under Art. 7425(b)-24, Vernon's Annotated Civil Statutes, and it is expressly provided under paragraph C thereof:

> "The only necessary parties to such actions shall be those persons designated by name in the instrument creating the trust, and any persons who may be actually receiving distributions from the trust estate at the time the action is filed; contingent beneficiaries designated as a class shall not be necessary parties."

James and Michael were not designated by name in the will of James Charles O'Connor, which created the O'Connor trust (Plaintiffs Exhibit No. 1, Record Vol. 5, pp. 1-3), nor were they receiving distributions from the trust estate at the time the state court case was filed; moreover they were contingent beneficiaries whose only interests were as the lawful issue of Mrs. Grey who would share in the remainder only if they survived her. *Coker v. Eckert*, 369 S.W. 2d 471, er. ref. n.r.e.; *Guilliams v. Koonsman*, 279 S.W. 2d 579 (S. Ct.); *Tipton v. Tipton*, 12 S.W. 2d 987 (Com. App.); etc.

Even apart from the statute James and Michael were not necessary to the validity of the state court judgment since their interests were virtually represented by their mother, Mrs. Grey. *Miller v. Foster*, 13 S.W. 529 (S. Ct.); *Winston v. Griffith*, 108 S.W. 2d 745; *Knioum v. Slattery*, 239 S.W. 2d 865, er. ref. n.r.e.; *Elly v. Moore*, 11 S.W. 2d 294 (Com. App.); etc.

The claim of fraud was really in connection with the partition and sale agreement rather than the state court judgment itself. Moreover, even if considered in connection with the judgment it is intrinsic rather than extrinsic. It is well settled in Texas, and recognized by the federal cases arising in Texas, that only extrinsic fraud will authorize relief from final judgments. Thus *O'Boyle v. Bevil*, supra, quotes *Alexander v. Hagedorn*, 226 S.W. 2d 996, in which the Supreme Court of Texas so holds. Judge Tuttle's quota-

tion from the *Hagedorn* case includes its quotation from *State v. Wright*, 56 S.W. 2d 950, of this language:

> "'Intrinsic fraud' in the procurement of a judgment is not ground, however, for vacating such judgment in an independent suit brought for that purpose. And within that term is included such matters as fraudulent instruments, perjured testimony, or any matter which was actually presented in and considered by the trial court in rendering the judgment assailed."

The *Wright* case was also cited with approval and substantially quoted by the Supreme Court of Texas in *Crouch v. McGaw*, 138 S.W. 2d 94. See also *Bankston v. Bankston*, 251 S.W. 2d 768; *Garcia v. Ramos*, 208 S.W. 2d 111, er. ref.; *Kelly v. Wright*, 188 S.W. 2d 983 (S. Ct.); *Old Nat. Life Ins. Co. v. Patillo*, 195 S.W. 2d 690, er. ref. n.r.e.; *Johnson v. Barnwell Prod. Co.*, 391 S.W. 2d 776 (1965); etc.

As declared in *Neill v. Neill*, 386 S.W. 2d 642 (1965), neither collateral nor direct attack upon a judgment can be based upon intrinsic fraud.

Likewise this Court in *U. S. v. Throckmorton*, 98 U.S. 61, 25 L. Ed. 93, declared, "The court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed." See also *Dowdy v. Hawfield*, 189 F. 2d 637, cert. den. 342 U.S. 830, 96 L. Ed. 628; *Bradburn v. McIntosh*, 159 F. 2d 925; *Durham v. New Amsterdam Cas. Co.*, 208 F. 2d 342; *Josserand v. Taylord*, 159 F. 2d 249; *Alleghany Corp. v. Kirby*, 218 F.S. 164, aff'd 333 F. 2d 327, cert. dism. 384 U.S. 28, 16 L. Ed. 2d 335; etc.

Fraud as to questions examined and determined in the action or the matter on which the judgment was rendered is necessarily intrinsic. *Caldwell v. Taylor*, 23 P. 2d 758; *Pico v. Cohn*, 25 P. 970; *Clark v. Clark*, 210 P. 93; etc. These cases are cited to such effect in *Hagedorn*, which goes on to say:

> "In fact, the principle is so generally applied that Freeman states in his Law of Judgments (5th Ed.), Vol. 3, p. 2567, that judgments are not impeachable for frauds relating to the merits between the parties; that all mistakes and errors must be corrected from *within* by motion for a new trial, or to reopen the judgment, or by appeal; that the fraud which will otherwise relieve must be in some matter *other than the issue in controversy* in the action." (Emphaisis that of the Supreme Court of Texas).

Further cases so holding include *Corley v. Centennial Construction Co.*, 146 S.E. 2d 609 (1966); *Silitronic Chemical Corp. v. R.K.M. Enterprises*, 197 So. 2d 33 (1967); *Baskin v. Baskin*, 381 S.W. 2d 442 (Ark.); and *Willson v. Burner*, 41 Cal. Rptr. 449 (1964).

The judgment of the 116th District Court expressly found that in its negotiations with Petitioners the Bank made a "full and frank disclosure of all relevant facts known" to the Bank concerning the value of the A'Mell Building or bearing on the fairness of the partition and sale. (R. 129) It likewise expressly found that the partition was fair and equitable to all parties. Testimony was presented to the state court at length, and the transcript of those proceedings was introduced below as DX-127 (R. 870); see also R. 796, 1480, 1767-1768, etc. Thus the issue of whether the Bank

made a full disclosure or not was passed upon in the state court, whether the result there was right or not, so that any fraud in that connection is intrinsic, rather than the issue being withheld from consideration by the state court, which would have been necessary for the fraud to be extrinsic.

O'Boyle v. Bevil, supra, found that the fraud there did consist of "intentional misleading actions that result in the withholding of an issue from the court that, but for such actions, the other party would present to the court," and that the Texas courts recognized such as extrinsic fraud. This is distinguished from fraud in connection with an issue which is presented to the court but merely leads it to decide that issue wrongly. Of course there actually was no material misrepresentation here, as the jury correctly found, but we assume Petitioners' allegations for present purposes, to show that the fraud alleged was not the kind which would have authorized attack upon a final judgment.

Not only the state court judgment here but likewise the record as a whole in that proceeding show jurisdiction, and Petitioners must go outside of not only the judgment but the whole record by purely external evidence to even attempt to show lack of jurisdiction. This the cases do not allow them to do. Even after Petitioners offered proof completely outside the judgment record, the jury and the District Court found against them on the fact issues with respect to both jurisdiction and misrepresentation and justifiably so, but really, under the relevant law, Petitioners were not

entitled to make such an attack upon the state court judgment, so that if there were any errors during the course of the trial they could only be harmless and immaterial.

3.

The findings of the jury and the District Court were adequately supported by the record and not clearly erroneous, and the Court of Appeals correctly so held.

In addition to the recitals in the state court judgment itself, the other parts of the judgment record show that James and Michael appeared and filed an answer and that an attorney took part in the hearing in their behalf. The jury expressly, and the District Court impliedly, found that such attorney was authorized to represent them, and such findings are supported by the law and the evidence.

It is the majority rule that a domestic judgment valid on its face is not subject to collateral attack on the ground that the defendant was not served with process and that the attorney entering his appearance had no authority to do so. Texas cases to this effect include *Watson v. Hopkins*, 27 Tex. 637 (S. Ct.); *Levy v. Roper*, 256 S.W. 251 (S. Ct.); *Letney v. Marshall*, 15 S.W. 586 (S. Ct.); etc. See also *Field v. Gibbs, Pet. C.C.*, 155 Fed. Cas. No. 4766; *Rose v. Parker*, 99 Atl. 817; *Johnson v. Baumhoff*, 18 S.W. 2d 13 (Mo.); etc.

Even as to direct attacks it is presumed that an attorney entering an appearance for a party is duly authorized, and such presumption prevails until it has been conclusively,

or at least clearly and convincingly, proved that the attorney was not so authorized either expressly or impliedly. Thus *Hidalgo County Drainage District No. 1 v. Magnolia Petroleum Co.*, 47 S.W. 2d 875, er. ref., declares, "As in any other case, the presumption of law is that the attorney appearing for a party is duly authorized, and such presumption will prevail until it has been conclusively shown that the attorney was not authorized to appear for the litigant." It is held that "the presumption in favor of authority for appearance is especially strong where it is sought to invalidate a judgment." *Liken v. Shaffer*, 64 F.S. 432. See also *Sloan v. Jepson*, 252 N.W. 535; *Paradise v. Vogtlandische Maschinen-Fabrik*, 99 F. 2d 53; *Burns v. Prudential Ins. Co.*, 294 N.W. 906; *Feldman Inv. Co. v. Connecticut General Life Ins. Co.*, 78 F. 2d 838; *Kynerd v. McCarthy*, 3 F. 2d 32; *Cigler v. Keinath*, 167 Ill. App. 65; etc.

James and Michael both personally signed the agreement, negotiated with James present and participating, requiring the Bank to file a petition in the District Court of Dallas County as quickly as practicable in which they were to be named as parties and would promptly file an answer asking approval and confirmation of the agreement, which judgment was expressly to be entered before December 31, 1960. (R. 106-124) The New York attorney Dorsey was authorized to represent their mother Mrs. Grey and through him Mr. Kelton was authorized to appear for her without question. Michael testified that his mother recommended to him that he file an answer in the proceedings and that

he agreed with her that he would do that. (R. 585) James and Michael had previously been represented by Mr. Dorsey in connection with other trust matters. (R. 518, 1457, 1709, 1715)

Michael testified in his deposition as to his knowledge from his mother that Mr. Dorsey was representing and negotiating for the three of them in Dallas, "Well, I knew he was taking care of our case, so, 'yes, sir,'" and further:

> "Q. Now you have testified that you didn't discuss with your mother that Dorsey was taking care of these Dallas negotiations, but that you assumed it. By that did you mean to infer that you assumed he was taking care of any interests you might have in the property?
>
> "A. Yes, I believed Dorsey was handling the family interests, my brother's and mine and mother's at the same time." (R. 572)"

Later, before signing, Michael inserted the words, "in the sense that my brother and I were my mother's heirs," such addition being suggested by Mr. Alexandroff, one of the attorneys for Petitioners. (R. 573-575) Michael testified that he depended on his mother to see that the contract was carried out. (R. 540-543)

James testified from the witness stand:

> "Q. Now you knew that Mr. Dorsey was available for any information of a legal nature that you needed, didn't you?
>
> "A. Yes." (R. 1736)

He said in his deposition, with reference to Mr. Dorsey, "I thought because he represented my mother he repre-

sented me, because we were all of the same family." (R. 1753-1754)

Dorsey testified that, in connection with partition, he discussed the Bank's suggestions thoroughly with Mrs. Grey, James, and Mike at least 7 or 8 times with all three being present. (R. 1131.) He had previously represented James and Michael in connection with the McLanahan Trust beginning in 1956 and continued to represent them up until February, 1961 (R. 1132-1133), and had represented both Mrs. Grey and the boys in connection with another trust accounting matter (R. 1135-1136) and in connection with an abandonment of land in the 30's or early 40's with respect to the O'Connor Trust (R. 1137-1138); he had advised Mrs. Grey and James about drawing up a trust agreement to give James some independent income (R. 1138); and from 1956 to February 1961, he was the only attorney who represented Mrs. Grey, James or Michael. (R. 1138)

Dorsey further testified that he saw James in connection with the partition and sale three or four times in his office (R. 1146); after the fall of 1959, he saw a great deal of Michael in connection with the partition among other things and discussed the situation with Mrs. Grey, James and Michael all together with conferences in Mrs. Grey's suit at the Sulgrave Hotel (R. 1148); he submitted a written proposal to the Bank for partition of the properties in question, and he had the authority of Mrs. Grey and James and Michael to submit this proposal. (R. 1159)

On the plane returning to New York from Dallas after the partition and sale agreement was drawn up, Dorsey went over it all with Mrs. Grey and then changed seats and went over it with James (R. 1186); he discussed the prospective Texas suit with both Mrs. Grey and James and in the presence of Mrs. Grey and James told the bank officials that any counsel the Bank suggested would be satisfactory to Mrs. Grey and the two boys. (R. 1188-1189) He approved the suggestion of Mr. Kelton as attorney for Mrs. Grey and the two boys and by telephone told Mr. Kelton that he was authorized to represent all of them. (R. 1190) Dorsey expressly advised Mrs. Grey that he had employed Mr. Kelton on her behalf and on behalf of the two boys, doing so in writing. (R. 1192-1196) In the presence of James, Mrs. Grey instructed him to direct all correspondence to her and that she would take it up with the boys. (R. 1198)

Dorsey also testified that he saw James and Michael in Paris in September, 1959, and discussed the partition with them. (R. 1219) His testimony also includes the following:

> "'Q. Did Michael ever specifically state to you that his mother was his agent or that she had authority to represent him in connection with any matter involving the O'Connor Trust?
>
> "A. Yes. He did not specifically say that she was—you used the word "agent" — but whatever his mother wanted, was okay with him.
>
> "Q. When did he state that?
>
> "A. He stated it on previous occasions, on many occasions.

"Q. Before April 25th?

"A. Oh, yes.

"Q. 1960?

"A. Yes.

"Q. Was it earlier than 1959?

"A. It goes back to the handling of the McLanahan Trust. I was their attorney.

"Q. Clear back to 1956?

"A. Yes.'

" 'Q. You have testified previously in response to a question for counsel for the Defendant Bank, that you had authority from James and Michael Grey to submit that proposal, and my question now to you is how did you get that authority?

"A. Because we had many, many conferences from the time the appraisals came in in October of 1959, I believe, until this letter went out on March 21, 1960, as to the different allocations of the property. And, Mrs. Grey, James and Michael were in those conferences.

"Q. Were James and Michael in all the conferences?

"A. They might have been and they might not have been, but they were in a majority of them, by far the majority of them.

"Q. Were there as many as five conferences?

"A. Yes, there certainly were.

"Q. Approximately how many, would you say?

"A. My tally sheet will show you, my previous testimony will show what conferences I had. There were many of them, they were all held at the Sulgrave Hotel.'

"'Q. What was said at any such conference which you and/or your counsel have just described here, or any such meeting, by Michael Grey with respect to your being his attorney and having authority to make such a proposal for him?

"A. We sat down in family conferences, Mrs. Grey, James and Michael and we had interminable conversations with respect to the lease on the Neiman-Marcus building and whether it should be in the Trust of which the boys would be the remaindermen or whether it should be allocated to one of the others; and we all decided, Michael, James and Mrs. Grey, that we wanted to assure the boys with their consent and they wanted it that way, to have an income from the Neiman-Marcus lease of $40,000.00 a year, or $20,000 a year apiece.

"Q. Did Michael Grey ever say to you in any such meeting, 'Will you be my attorney, Mr. Dorsey'?

"A. He certainly said it by implication.

"Q. Did he ever say it specifically?

"A. Yes. I was representing him." (R. 1227-1228)

Mrs. Grey testified that James and Michael left the managing and handling of the properties to her. (R. 1296) She acknowledged that Mr. Dorsey wrote her of the employment of Mr. Kelton to represent her and the boys and that she made no objection. (R. 1329, 1376, 1387-1388) The boys just left things to her. (R. 1389)

Under this testimony, and in view of the strong presumption in favor of the authority of an attorney filing a pleading for a party, especially upon attack of a final judgment, the court and jury were certainly warranted in finding as they did that Mr. Kelton was authorized to act for James

and Michael, as well as Mrs. Grey. Their own testimony to the contrary, as interested parties, was not conclusive or binding upon either the court or the jury. Such authority may be either express or implied and it could well be found that James and Michael, while they were adults, left matters concerning the Trust properties to their mother and that she authorized Mr. Dorsey to represent the three of them and he in turn with her knowledge and consent authorized Mr. Kelton to do so. There is also ample direct testimony from Mr. Dorsey that he was representing James and Michael as well as Mrs. Grey and frequently conferred with them about these matters and had authority from them.

The finding of authority to enter appearance for Michael and James establishes jurisdiction in the state court, so that the other findings are not necessary to the judgment. However, the jury and trial court likewise found that there were no material misrepresentations or concealments and that the partition and sale agreement and the judgment in the state court were fair and equitable. These findings are likewise supported by ample evidence in this voluminous record.

4.

Petitioners were not entitled to relief herein because under the jury verdict, the Court's findings, and the record they suffered no damage.

The jury found from a preponderance of the evidence that there was no damage suffered by any of Petitioners (Special Issue No. 5) and further that the A'Mell Building

did not have a fair market value in excess of the price paid for it by the Bank. (Special Issue No. 11) These findings are amply supported by the record.

An appraisal by Mr. Dunham, a member of the American Institute of Real Estate Appraisers, and Mr. Smitham, a member of the Dallas Real Estate Board and the Texas and National Association, put the fair market value of the A'Mell property at $750,000.00, which the witness Majors considered optimistic (R. 1587-1589), and Majors & Majors had put a price of $650,000.00 on it. (R. 1591) In October, 1959, the Dallas Real Estate Board appraised the A'Mell property at $500,000.00. (R. 1687, 785-786) The jury was clearly warranted in finding that the A'Mell building did not have a fair market value in excess of the $1,155,000.00 paid for it by the Bank, in view of such appraisals in the record. Indeed, there was no evidence at all that it had any greater value. The price paid by the Bank for this property was considerably in excess of its fair market value and the transaction was a highly favorable one for Petitioners, so that they have clearly suffered no damage.

A part of the claim of fraud is that the Bank did not reveal to them that a brokerage commission of $23,750.00 was paid in connection with the purchase of the Republic Garage Building, in addition to the $650,000 purchase price, and further that the acceptance of only 5% interest on a

note of Mr. Majors which provided for 5% before and 10% interest after maturity constituted additional consideration for the Republic Garage Building in the amount of $57,585.00. With respect to the commission, of course there was no representation that there had not been a commission. Mrs. Grey testified that she knew that it was usual and customary for real estate transactions and that their commission was sometimes paid by the purchaser. (R. 1373)

There is no showing in this record, and certainly no conclusive showing, that the failure to charge additional interest on the Majors note after maturity was in any way connected with the purchase of the Republic Garage Building; indeed Robert Stewart, the Bank President, testified that it was the regular custom and practice of the Bank not to charge the additional interest allowable on a note after maturity when the maker has died, and that the Bank never did so. (R. 743-744)

In any case the only claimed relevance of these matters was that Mrs. Grey wanted to get more for the A'Mell Building than the Bank paid for the Republic Garage Building. (R. 1312; etc.) The Bank paid $650,000.00 for the Republic Garage Building. However, even if it be assumed that the brokerage commission and the forgiveness of increased interest on the Majors note be added in, the purchase price of $650,000.00 would only be increased by addition of $23,750.00 and $57,585.00, bringing the total to $731,335.00. This is still far less than the Bank paid for the A'Mell Building.

Petitioners also contended that the Bank misrepresented the purchase price of other buildings by failing to include payments made by the Bank, after it acquired the fee interests and 99-year leases, to obtain cancellation of outstanding shorter leases and for immediate possesion. As a matter of law these payments made after the purchase of the properties by the Bank to obtain cancellation of leases are not part of the purchase price. In any event there is no showing that there was any damage to Petitioners in this respect nor in any other respect.

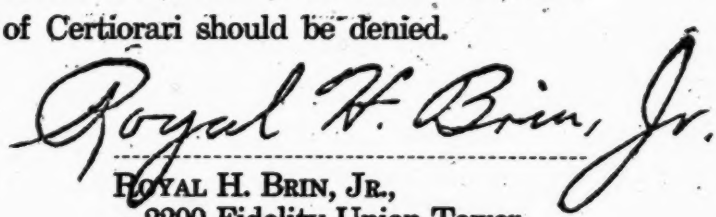
CONCLUSION

This is a case in which the Bank bent over backwards to be completely fair and above board; recognizing the possible conflict of interest when it wished to purchase property belonging to trusts of which it was a trustee, it did not attempt to deal with itself as trustee but rather disclosed the situation to the beneficiaries, offered to resign, and then negotiated with the beneficiaries themselves and their attorney Dorsey rather than attempting to represent the beneficiaries as trustee in the negotiations with itself. The beneficiaries also had the benefit of other independent outside advice. When the beneficiaries had negotiated a deal satisfactory to them and greatly in excess of fair market value, the Bank then presented the matter to a district court of Dallas County in a suit to which the Attorney General of Texas was a party as well as the beneficiaries, in order to have further independent consideration of the fairness and advisability of the transactions.

The Motions to Dismiss were well taken, and Petitioners were not really entitled to the trial they received. However, they did receive a full and fair trial and opportunity to develop the facts, and those facts were decided against them on a record which supports such findings.

The decision of the Court of Appeals here turned upon an evaluation of the particular facts involved and upon construction of a state statute whose constitutionality has not been questioned. There are no matters here of extraordinary national importance nor great constitutional significance such as to call for the exercise of jurisdiction by this Honorable Court.

WHEREFORE, PREMISES CONSIDERED, we submit that the Petition for Writ of Certiorari should be denied.



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APPEARANCE AND CERTIFICATE OF SERVICE

I, ROYAL H. BRIN, JR., hereby request the Clerk to enter my appearance as counsel for Respondent, First National Bank in Dallas, as Successor Trustee of the James Charles O'Connor Trust, and as one of the attorneys for said Respondent and a member of the Bar of the Supreme Court of the United States, I hereby CERTIFY that on the 11th day of Oct., A.D. 1968, I served true and correct copies of the foregoing Brief of Respondent First National Bank in Dallas, Successor Trustee of the James Charles O'Connor Trust, by depositing the same in the United States Post Office with First Class Postage Prepaid, addressed to Gerald Meyer, 477 Madison Avenue, New York, New York 10022, Attorney of Record for Petitioners.

Royal H. Brin, Jr.

Royal H. Brin, Jr.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 513

CORNELIA O'CONNOR GREY, JAMES CHARLES GREY and MICHAEL CARTER GREY,

Petitioners,

—v.—

FIRST NATIONAL BANK IN DALLAS in its private capacity and as trustee of the O'Connor and Morgan trusts and the Attorney General of Texas,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 513

CORNELIA O'CONNOR GREY, JAMES CHARLES GREY and MICHAEL CARTER GREY,

Petitioners,

—v.—

FIRST NATIONAL BANK IN DALLAS in its private capacity and as trustee of the O'Connor and Morgan trusts and the Attorney General of Texas,

Respondents.

REPLY BRIEF FOR PETITIONERS

Respondent Bank, speaking with three separate voices,[1] opposes the granting of the petition on a variety of grounds which would obscure the primary issue here involved in a plethora of irrelevancies and inaccuracies. Respondent's contention, Arms. Br., pp. 5, 6, that the petition "is based primarily on procedural matters on which the decision of the Court of Appeals is final under the federal judicial

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[1] Three separate briefs in opposition have been filed by different lawyers acting on behalf of respondent Bank: the first, on behalf of the Bank in its "private", or "individual", capacity, hereinafter referred to as "Coke Br.", the second, on behalf of the Bank as "successor trustee of the James Charles O'Connor trust", hereinafter referred to as "Brin Br.", and the third, on behalf of the Bank as "successor trustee of the Ivor O'Connor Morgan trust", hereinafter referred to as "Arms. Br.".

structure", is, of course, wholly unfounded. See, e.g., *First National Bank* v. *Cities Service Co.*, 391 U. S. 253 (1968); *Provident Tradesmen's Bank* v. *Patterson*, 390 U. S. 102 (1968); *International Longshoremen's Assn.* v. *Philadelphia Marine Trade Assn.*, 389 U. S. 64 (1967); *Schlagenhauf* v. *Holder*, 379 U. S. 104 (1964); *Johnson* v. *New York, N. H. & H. R. Co.*, 344 U. S. 48 (1952).

Indeed, the increasing use of the "special verdict" procedures sanctioned by Rule 49(a) of the Federal Rules of Civil Procedure, to which this Court appears never to have spoken, and the utter confusion, if not the virtual denial of the right of fair trial, to which the untutored use of such procedures must, as it did in this case, inevitably lead, point directly to the "importance to the public" of an authoritative resolution by this Court of a "problem which is beyond the academic or the episodic", and which goes to the very heart of the administration of justice by the federal courts. *Layne & Bowles Corporation* and *Rice, loc. cit.*, Arms. Br., pp. 5, 6.

I.

Rule 49(a) of the Federal Rules of Civil Procedure is explicit that in requiring a jury to return special verdicts, "[t]he Court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue". The first of the questions here is the soundness of the decision of the Court below that in its charge to the jury the District Court obeyed this injunction.

Petitioners have urged, Pet. 19-23, that the disputed charge, Pet. 11; I R. 292, in effect withdrew from the jury any question concerning the binding effect of the State

Court judgment insofar as concerned Mrs. Grey, and, insofar as concerned James and Michael, left for the jury's determination only whether the attorney who purported to appear for them in the State Court action had authority to do so. The Court below rejected petitioners' contention, holding that the charge in question related merely to "the issue of the State Court's jurisdiction", i.e., its personal jurisdiction over petitioners, and that this "was completely separate from the issue" whether respondent "fraudulently obtained that judgment". Pet. 11, 16(a); 393 F. 2d at 382.

But what the District Court intended the jury to understand by her charge, and what the jury understood it to mean are, at least, obscured by an abundance of ambiguities. Thus, it will be observed that in instructing the jury with respect to the contentions of plaintiffs, i.e., petitioners here, I R. 291, the District Court made no mention of petitioners' basic contention that the State Court judgment was not binding on them because it had been obtained by fraud. It will also be observed that in instructing the jury with respect to the "issues in this case for your decision", I R. 292, the District Court makes no reference to the basic issue whether the State Court judgment had been induced by fraud, and was, therefore, not binding on petitioners. The only reference to petitioners' contention with respect to the State Court judgment appearing in the District Court's instructions to the jury, was that James and Michael contended "that they did not authorize the employment" of the lawyer who purported to appear for them in that case. I R. 291. Moreover, while the District Court *overruled* respondent's motions at both the end of the plaintiffs', i.e., petitioners' case, and at the end of the whole

case, III R. 1470, 1471; IV R. 1786, 1787; Pet. 9, 10,[2] in taking the earlier action, the District Court said, III R. 1471:

> I would like to say, however, that *I am not going to submit anything to the jury with reference to the State Court case except the question of authority of Mr. Kelton,* and that really the effect of the submission that I have in mind is that *I am affirming or saying that the partition and sale is approved as far as Mrs. Grey and the O'Connor Trust is concerned,* and that the only thing I am submitting to the jury is the issue of damages. [Emphasis supplied.]

The District Court then noted with rare sagacity that, "I am not sure that I am making myself clear," adding, III R. 1471,

> "but I think that there are two reasons why there are no grounds for setting aside the partition—one is that I do not think that it would be equitable to do it, and the second is that *it has been approved by the State Court, and that the O'Connor Trust and Mrs. Grey were represented, and the lawyers who represented them were authorized to act, so that I see nothing to submit to the jury as far as partition and sales agreement is concerned.* [Emphasis supplied.]

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[2] More precisely, at the end of plaintiffs', i.e., petitioners', case, the District Court overruled defendant's, i.e., respondent's, motions for a directed verdict except the motion made in its capacity as successor trustee of the Ivor O'Connor Morgan Trust, which was granted because only equitable relief was demanded with respect to such trust. III R. 1467-1469. As already noted, Pet. 10, the District Court very early determined that there would be no equitable relief. IV R. 1809, I R. 33.

With this as the District Court's exposition and explanation of what she intended to leave to the jury, the decision of the Court below is inexplicable.

Certainly, if the District Court intended to leave the jury to understand that the State Court judgment was to be disregarded by them if they found that it had been obtained by fraud, she nowhere told them so in her charge. In any event, if the disputed charge is, indeed, susceptible of the very limited meaning attributed to it by the Court below, it is also clearly susceptible of the meaning petitioners attribute to it, and which it would appear the District Court actually had in mind. In this ambiguous posture, the instruction cannot meet the requirement of Rule 49(a) that the jury be given "such explanation and instruction concerning the matter • • • submitted as may be necessary to enable the jury to make its findings upon each issue". Respondent's several oppositions to the petition make this clear.

In its "private" or "individual" capacity respondent urges in opposition to the petition that the meaning attributed by the Court below to the disputed instruction is altogether correct in that "the charge as a whole" admits of no other interpretation. Coke Br., pp. 8-10, 16, 17. However, in its capacities as successor trustee of the James O'Connor and Ivor O'Connor Morgan trusts, respondent in effect takes the position that the State Court judgment was not under Texas law open to petitioners' attack and, defends the disputed instruction on the ground that there was no issue in that regard properly to be submitted to the jury.[3] Brin. Br., pp. 8-12; Arms. Br., pp.

[3] Respondent's exposition of the distinction between "intrinsic" and "extrinsic" fraud as the basis for an attack on a judgment

14, 15. But the standard established by Rule 49(a) for instructions to a jury when special verdicts are required, is not met when in order to be understood, an instruction needs such explanations as the Court below and the respondent have advanced.

Certainly, if the respondent's own counsel in its several capacities can in good conscience advance divergent views as to the significance of the disputed instruction, who can say what it meant to the jury?

Respondent's effort, Coke Br., p. 18, to distinguish *Callen,* Pet. 21, 22, is unavailing. There the question was

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under Texas law, Coke Br., p. 17, fn. 8; Brin. Br., pp. 8-12; Arms. Br., pp. 6-7, is wholly beside the point, for the District Court is completely silent on this score, and the Court below expressly avoided the question on the ground that it was academic because "the jury found that the state court judgment was not procured by fraud". Pet. 12a, 13a, fn. 8; 393 F. 2d at 380, fn. 8. The jury, however, did not so find, as no special verdict in that regard was required of it. In any event, the jury's special verdicts Nos. 2 and 3, to which the Court below refers, Pet. 12a, 393 F. 2d at 380, are clearly inconclusive, not only because of the ambiguity of the questions as put by the District Court, but also because if the jury understood the disputed instruction as petitioners, and respondent in two of its capacities do, the jury had no alternative but to answer negatively. See Pet. 12, 13, 20, 21.

Substantively, moreover, the applicable Texas authorities do not support respondent's position. On the contrary, they make it clear that under Texas law, an action to set aside a prior judgment will lie if it was rendered in favor of a party who remained silent *notwithstanding a duty to speak* and the other party was thus left unaware of a valid defense. *McMurry* v. *McMurry,* 4 S. W. 357 (Tex. Sup. Ct. 1887); *Schneider* v. *Sellers,* 61 S. W. 541 (Tex. Civ. App. 1900); *State* v. *Wright,* 56 S. W. 2d 950, 952; *Eldridge* v. *Eldridge,* 259 S. W. 209, 214 (Tex. Civ. App. 1924); *Reed* v. *Bryant,* 291 S. W. 605 (Tex. Civ. App. 1927); *Ralls* v. *Ralls,* 256 S. W. 688, 695 (Tex. Civ. App. 1923). Here, of course, respondent, as petitioners' trustee and agent, was under a duty to speak.

whether a release was "binding"; here the question was whether a State Court judgment was "binding". There, in effect, the Court charged that the release was "not binding", except to the extent of the consideration paid therefor; here the charge was that the State Court judgment was "binding" on Mrs. Grey, and was binding on Michael and James, as well, if the attorney who purportedly appeared for them had authority to do so. If, as this Court held in *Callen,* the charge there had the effect of taking the basic issue in the case from the jury, notwithstanding the trial court's efforts at correction, *a fortiori* the charge here had that effect, for the District Court made no effort whatsoever at any correction or clarification.

II.

While it may be, as respondent contends, Coke Br., p. 20, that under Texas law "silence, where the party is under a duty to speak, may amount to a concealment", the question here is whether the District Court's instructions to the jury were such that the jury must reasonably be taken to have understood the word "concealed" as used by the District Court in its Special Issue No. 3, Pet. 12a, I R. 289-304, to include mere silence on respondent's part, regardless of good faith. Certainly, the jury cannot reasonably be said to have gotten such an understanding from the disconnected excerpts from the District Court's charge to which the Court below refers. Pet. 14a, 15a; 393 F. 2d at 381, 382. Thus, the District Court's statement to the jury that respondent contended that "it made full disclosure" to petitioners, did not instruct the jury that an innocent failure of respondent to disclose a material fact was of equal significance to a purposeful concealment of such a fact in bad faith.

Nor was the jury so instructed by the District Court's statement that "there must be fair dealing and good faith by the Trustee toward the beneficiary. The Trustee * * * has a duty to impart to the beneficiary all material facts * * *". For with the element of "good faith" so injected, how could the jury have understood that mere failure to disclose, not in bad faith, was encompassed by the word "concealed"?

In any event, nothing in any of respondent's oppositions to the petition, nor in the opinion of the Court below is adequate to overcome the failure of the District Court expressly to include "failure to disclose" in the special issues submitted to jury. Respondent's "failure to disclose" was expressly an issue in the case, Pet. 24-26, and petitioners expressly requested that such issue be submitted to the jury. Pet. 25. As respondent has so aptly put it, Arms. Br., p. 11, the District Court "should, especially where requested to do so, submit questions covering all issues raised by the pleadings".

III.

The record readily supplies the short answer to respondent's contention, Coke Br., p. 22, that petitioners are in error in asserting, Pet. 15, that it was admitted by respondent "in its answer that it had not made disclosure * * * of Majors' indebtedness to it secured by the Republic Garage Building". Thus, in their complaint, I R. 64, 65, 67, petitioners alleged:

> Neither at the time said representations were made * * *, nor at any other time material hereto, did defendant Bank disclose to any of the plaintiffs that
>
> * * * * *

> (j) On or about March 21, 1956, Z. L. Majors, Trustee, executed and delivered to defendant Bank a deed of trust upon the Republic Garage Building as security for the aforesaid alleged loan of $650,000.00, as evidenced by a promisory note of even date, and since March 23, 1959, said deed of trust and note as renewed had been in default.

Respondent's answer to this allegation was, I R. 190:

> (j) Because of the death of Z. L. Majors, Trustee, defendant cannot admit or deny, as a factual matter, that the note referred to was in default. Defendant admits the other allegations contained in subparagraph (j) but alleges that plaintiffs had notice of such deed of trust and note by virtue of the fact that said deed of trust was duly recorded in the Deed of Trust Records of Dallas County, Texas.

Clearly, petitioners' reference was, correctly, to respondent's admission in regard to the loan to Majors on the Republic Garage, and not to "the acquisition by Z. L. Majors, Trustee, of the A'Mell Building", as respondent mistakenly contends. Coke Br., p. 22.

Petitioners not only called the District Court's attention, Pet. 15, to the foregoing significant passages from the pleadings, but to the pages of the transcript where Stewart, respondent's president testified as follows, II R. 499, 505:

> Q. Mr. Stewart, did you ever tell Mr. Dorsey, Mrs. Grey, or her son James, that the bank held a deed of trust on the Republic Garage Building as a security

for a debt in the amount of $650,000? A. I said I don't recall that [I] did.

* * * * *

Q. You did not feel that you should inform Mrs. Grey or Mr. Dorsey or her son that the bank at that time held a note and deed of trust on the Republic Garage Building? A. You are asking me if I thought I should tell her that?

Q. Yes, sir. A. I certainly did not.

Petitioners also directed the District Court's attention to the page of the transcript where Presley, respondent's senior vice president, testified as follows, III R. 1016:

Q. All right, were you asked as to whether or not the Bank held a mortgage from the Majors on the Republic Garage Building? A. We were not asked that question.

Q. Did you give any information to that effect? A. I don't recall that we gave any information to that effect.

The record, I R. 363, is also clear that when the District Court advised counsel of the jury's inquiry as to whether any testimony indicated disclosure by respondent to petitioners of Majors' indebtedness to respondent secured by the Republic Garage Building, petitioners' attorneys directed the Court's attention to the foregoing pleadings and testimony with particularity, and "requested that the Court instruct the jury that there was no such testimony in the record and that it was undisputed that the Bank had not advised" petitioners thereof.

Respondent misplaces reliance, Coke Br., p. 21, on a stipulation between the parties that on *August 21, 1961,* respondent advised petitioners' attorneys about the Majors-Republic Garage loan. For the partition and sales agreement was executed on *September 19, 1960,* and the State Court judgment was entered on *November 28, 1960.* I R. 118, 136. Moreover, it will be noted that special issues Nos. 2 and 3 submitted to the jury, and to which alone its inquiry was relevant, referred specifically to times antedating "the partition and sales agreement of September 19, 1960, and the judgment of the State Court of November 28, 1960". I R. 297, 298.

Respondent's effort, Coke Br., pp. 22, 23, to distinguish *Jackson,* Pet. 27, is utterly unavailing. Respondent's admission in its answer, and through the testimony of its president and senior vice president, leaves no room for cavil, ~~that the correct answer to the jury's inquiry was simply "No". For,~~ there was no issue regarding the utter failure of respondent to make disclosure of Majors' indebtedness secured by the Republic Garage Building, and contrary to respondent's views, Arms. Br., p. 12, even under Texas procedure in this regard, which allows the trial court less leeway than federal procedure, it has long been held, *Int. and G. N. R. R. Co.* v. *Stewart,* 57 Tex. 166, 170 (1882) that:

> Where the evidence to a fact is positive and not disputed or questioned, it is to be taken as an established fact, and the charge of the Court should proceed upon that basis.

Certainly, this rule must prevail where in the absence of such a charge, the jury itself requests that it be in-

structed. In these circumstances petitioners were, as the Court said in *Jackson,* 257 F. 2d at 43, "entitled to have the jury informed as a matter of right".

IV.

Respondent's strong language, Arms. Br., p. 12, in regard to the fourth ground asserted in support of the petition, Pet. 10, 28, is wholly without warrant. Indeed, the shoe is on the other foot. Moreover, contrary to respondent's contention, petitioners did present to the Court below the matter of the District Court's apparent "bias and prejudice" in a section of their brief in the Court below (pages 5-7) headed "Trial Court Prejudged The Case", which is set out *in toto* in the Appendix hereto, pp. 1a *et seq.* While this was not expressly adverted to in the Specification of Error, so-called, that omission is immaterial because such Specification, under Rule 75(d) of the Federal Rules of Civil Procedure is no longer required,[4] and under the Rules of the Court below, is but a part of an appellant's brief, and both respondent and the

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[4] As stated in the Committee note to the 1966 revision of subdiv. (b) of Rule 75:

> "The appellant is required to serve a statement of the issues which he intends to present on appeal if only a part of the proceedings is transcribed solely to allow the appellee to determine whether the partial transcript will be adequate for the determination of those issues. Such a statement is not the equivalent of an assignment of errors, which was specifically declared to be unnecessary by the terms of former Rule 75(d) (the former provision dispensing with the assignment of errors is omitted from the rule only because the requirement of an assignment is deemed sufficiently obsolete as not to require pointed abolition) and the statement should not result in limiting the issues on appeal".

Here all the proceedings in the District Court were transcribed and transmitted to the Court below.

Court below had full and timely notice of petitioners' contentions in this regard.

Neither *Lawn, Husty,* nor *Duignan,* on which respondent relies, Coke Br., p. 24, supports respondent's contention. In *Lawn,* the Court rejected as a ground for a new trial in a criminal case that certain exhibits had been unlawfully seized in violation of the defendant's constitutional rights where the defendant's attorney with full knowledge had used such exhibits to corroborate an aspect of the defendant's defense and had expressly stated that he had "no objection" to their receipt in evidence. In *Husty* the Court refused to review rulings of the trial Court excluding certain evidence, on the ground that such rulings "were not assigned as error on the appeal to the Court of Appeals, *and it does not appear that they were presented or passed upon there*". 282 U. S. at 701, 702. Similarly, in *Duignan,* the Court refused to consider a constitutional question because "The assignment of errors below did not refer specifically to it * * *, *and so far as the record discloses it was not presented there*". 274 U. S. at 200 (emphasis supplied). Here, the point was made in the Court below. *Infra,* pp. 1a *et seq.*

The remarks of the District Judge to which petitioners have averted, Pet. 10, were not, as respondent says, Coke Br., p. 24 "carefully selected for quotation by the petitioners," but, rather, were carefully selected by someone having authority to issue directions to the court reporter to be "edited and omitted from the original transcription * * *", I R. 27.

The hollowness of respondent's contention that "taken in context" the District Judge's remarks "show a re-

spectful attempt * * * at a 'simplification' of the issues", Coke Br., p. 24, is laid bare when one reads them in context and recalls that somehow or other they had been "edited and omitted" from the transcript, to be restored to the record only after petitioners brought on a motion, the prosecution of which included taking the testimony of the court reporter. I R. 27, 32-33; IV R. 1809, I R. 33. Petitioners and their counsel exhibited great restraint, tolerance and respect in not filing an affidavit of "personal bias or prejudice" against the District Judge. Certainly, their forbearance should not result in their further prejudice.

V.

Respondent contends, Coke Br., p. 25, that the issue concerning Kelton's authority to represent James and Michael in the State Court case, Pet. 15-18, 29-32, presents "[n]o important question of Federal law." Respondent also contends, Brin. Br., pp. 5-7, that, in any event, under applicable law, Kelton's lack of authority to appear for James and Michael could not be established in this action by evidence *dehors* the record in the State Court case. Both of these contentions are refuted by *Cooper* v. *Newell*, 173 U. S. 555 (1899), the holding and reasoning of which are no less cogent today than when it was written.

Cooper came to this Court on certificate from the 5th Circuit inquiring whether the judgment of a Texas state court was subject to "collateral attack" in a federal court by evidence showing that Newell, the defendant in the state action and plaintiff in the federal action attacking the earlier judgment, was served with neither citation nor process, and that the attorney who had purported to appear in

the state action for him did so without his authorization. Holding that federal courts have the power to entertain and determine such actions, and that "the question of jurisdiction [of the court which rendered the earlier judgment under attack] is open to inquiry even when the judgment of a court of a state comes under consideration in a court of the United States, sitting in the same state," 173 U. S. at 567, this Court said, 173 U. S. at 568, 569:

> It must be remembered that this action was commenced by Newell as a citizen of New York against citizens of Texas, *in the exercise of a right secured to him by the Constitution of the United States,* and it would go far to defeat that right if it should be held that he was cut off • • • from proving • • • *that he had not authorized any attorney to appear for him in that action.* [Emphasis supplied.]

Cooper recognizes, 173 U. S. at 566, 567, that federal courts, regardless of their location, have the same authority as state courts to inquire into the jurisdiction of a court of another sovereignty to render a judgment in issue before them, and are not bound to give judgments of the courts of any state "full faith and credit" except to the extent required of the courts of another state, observing, 177 U. S. 566, that:

> In Thompson v. Whitman, 18 Wall. 457, a leading case in this court, it was ruled that "neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, nor the act of congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a

> judgment offered in evidence was rendered"; that *"the record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction; and, if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist"* • • • . [Emphasis supplied.][5]

Nor is respondent on any surer ground in asserting, Coke Br., p. 25, fn. 16, in effect, that Kelton's disqualification to represent James and Michael by reason of conflict of interests, Pet. 18, 32, was not urged below. This point *was* raised below, under broad specifications of error,[6] in appellants', i.e., petitioners', brief, where petitioners urged (fn. 11, pp. 19, 20):

> The fact that it appears from the judgment roll of the 1960 state court action, relied upon by Bank as validating its self-dealing, that the *same attorney* represented Bank, Trustee, *and* the beneficiaries renders absolutely void the 1960 state court judgment because of the conflict of interest between his clients.

Likewise untenable is respondent's assertion, Coke Br., p. 25, fn. 16, that Dorsey's letter to Mrs. Grey of November 9, 1960, advising her that he had authorized Kelton to represent the O'Connor Trust, Mrs. Grey and James and Michael in the State court proceedings had the effect of making "Mrs. Grey (and in all probability James and

---

[5] See *Sidran* v. *Tannenbaum*, 391 S. W. 2d 93 (Tex. Civ. App. 1965), citing *Cooper*.

[6] Respondent professes to ignore that specification of errors is no longer required, *supra* p. 12 fn. 4.

Michael)" aware of the conflict. Indeed, not only is the record here clear that neither James nor Michael had any knowledge of Kelton's purported representation of them, Pet. 16, but as a matter of law even their express consent to Kelton's employment would have been ineffective. Pet. 32, fn. 19.[7]

The disqualification of Kelton to appear for petitioners supplies a conclusive answer to respondent's misplaced reliance, Brin Br., pp. 12-13, on the presumption of authority of an attorney entering an appearance for a party, for it is obvious that such presumption does not apply with respect to an attorney disqualified to act for that party.

---

[7] Under Texas law, even the consent of the client does not remove the disqualification of an attorney who represents conflicting interests. *J. W. Hill & Son, Inc.* v. *Wilson*, 399 S. W. 2d 152 (Tex. Civ. App. 1966); *W. C. Turnbow Petroleum Corp.* v. *Fulton*, 199 S. W. 2d 263, 264 (Tex. Civ. App. 1946). In *Bryant* v. *Lewis*, 27 S. W. 2d 604, 606-607 (Tex. Civ. App. 1930) it was held that the only exception to this rule is when the adverse interests *are not conflicting*, such as when an attorney adjusts differences as an arbiter, stating: "That even in such cases *all the facts*, and the extent of such adverse representation should be *fully understood* by both parties" and that the attorney must "affirmatively disclose to [the client] not only *all material* facts which would affect their relationship but to disclose *the legal consequences* of these facts as well". (Emphasis supplied.) Here, not only were the interest of the trustee and of the beneficiaries clearly conflicting, but Dorsey's letter to Mrs. Grey of November 9, 1960, VIII R. 1135, and the very partition and sale agreement, I R. 108, had misled her into believing that the interest of the Bank as Trustee of the O'Connor Trust and her own were identical and that the State court proceeding was a ministerial matter to be taken care of by respondent. How could then it be seriously argued that James and Michael, who had not even been informed either by respondent or by Dorsey or by anyone else of their rights and interests, or that they would have to be represented in the State court proceeding, II R. 516, 521; III R. 1248, 1249, 1245, 1247, IV R. 1754, had "in all probability" consented to be represented by an attorney acting for conflicting interests, with full understanding of the conflict and knowledge of the consequences thereof.

Indeed, even if there was no real conflict of interest, it would have been incumbent upon such attorney to prove that his alleged client's consent was given with full knowledge of the facts and understanding of their legal consequences. *Supra* p. 17, fn. 7.

It is also dispositive of respondent's belabored efforts, in complete disregard of Dorsey's own admission, Pet. 16, to discover some inference of Dorsey's employment by James and Michael in this matter from isolated sentences of testimony quoted out of context. Obviously, even if Dorsey had been employed by James and Michael with respect to the sale of the A'Mell Building and the State court proceeding, he certainly had no authority to delegate it to an attorney representing the conflicting interests of the adversary.

Moreover, respondent's truncated quotations, Coke Br., p. 14, fns. 5, 6, from Mrs. Grey's and Michael's testimony are misleading. Thus, the first passage quoted from Mrs. Grey's testimony, which related to the time of the State Court hearing, was immediately preceded by the following, III R. 1388, 1389:

> Q. So, if you had been present [at the State Court hearing] in person, you would have taken the same position that all the attorneys took, wouldn't you? A. At that time.
>
> Q. At that time? A. I would have, yes.
>
> Q. Then up until January, 1961, you did not want it to come about where you'd have to return those properties, seven pieces of property that you got, and the money, did you? A. That's right.
>
> Q. Nor did your sons, did they? *A. They knew so very little of it, I can't speak for them.* [Emphasis supplied.]

Similarly, the second passage quoted from Mrs. Grey's testimony, III R. 1296, was immediately preceded by the following:

> Q. Did you advise James and Michael what was going on with respect to those properties at that time? A. Well, I tried to but they weren't very interested * * * about it. They didn't feel it had anything to do with them.
>
> *Q. Well, they knew and appreciated that they were remaindermen in these properties? A. No they did not.*
>
> Q. They did not? A. They did not.
>
> Q. They didn't know they had interest in this property? A. They just didn't understand it.
>
> Q. Is it your testimony that they had no idea they had an interest in this property? A. I tried to make them understand it but it was never something they took seriously. [Emphasis supplied.]

Again, the passage quoted from Michael's testimony, II R. 576, continues as follows:

> Q. What have you argued with her [Mrs. Grey] about the Dallas property? A. I haven't argued anything about it.
>
> *Q. Well, you have been in complete accord with her, then, is that it? A. Well, I have never discussed Dallas matters with her, sir.*
>
> Q. Then, you have never mentioned it one way or the other from the beginning of time up until now, is that what you mean? A. Well—yes, sir.
>
> Q. Sir? A. Yes, sir, that's what I mean. [Emphasis supplied.]

Respondent's quotation, Coke Br., p. 15; Brin Br., p. 14, of Michael's testimony on deposition to the effect, II R. 572, that he "believed" that Dorsey "was handling the family interests", his, and his brother's and mother's "at the same time", is also misleading, for, at the trial, on cross-examination by an attorney representing the bank in one of its several capacities, Michael testified with respect to such testimony, II R. 572, as follows:

By Mr. Strasburger:

> Q. Didn't you so testify? A. I did so testify.
>
> Q. It is still the truth? A. As I explained it—at that time I believe[d] some day I might inherit and that therefore whatever was done to grow from that would be my interests.

And, just shortly before, II R. 521, Michael had testified, also on cross-examination, that he did not know that he and his brother had "valuable interests in Dallas", and, further, that his mother had not explained to him and his brother that "she only got the income from this property in Dallas, and on her death" it would be theirs. "She explained", he testified, "that she had properties in Dallas", and that his "understanding from her explanation was, one day we didn't have much * * *." He concluded that his "mother wanted" him and brother "to believe that we had to go and earn our own money, rather than wait for an inheritance." Pet. 17.

Thus, when considered in its context, the testimony on which respondent relies makes it clear that Michael had no understanding that he had any independent interest in the trust property, and believed only that some day he might possibly inherit it from his mother. In this circum-

stance, Michael's passivity can not give rise to the inference to which respondent is necessarily driven to support its contention that Kelton was authorized to appear for Michael in the State Court case, i.e., that Michael had authorized his mother to act for him with respect to his independent remainder interest. Obviously, since he did not know of such interest, nothing he did or failed to do can be taken as having reference to it.[8]

The record is clear that this is equally applicable to James, as well. Thus, on cross-examination by one of respondent's attorneys at the trial, IV R. 1753, 1754, with respect to his testimony on deposition, on which respondent relies, Brin. Br., pp. 14, 15, to the effect that he "thought" Dorsey "represented" him because he represented his mother, as they "were all of the same family," James testified:

> Q. * * * You said that didn't you? A. Yes.
>
> Q. You still say the same thing, do you affirm that today? A. No, because what I implied here is actually what I am saying today, in effect, that I am my mother's son. Naturally I was interested in seeing

[8] Respondent's lengthy quotation, Brin Br., pp. 16-18, from Dorsey's testimony to the effect that Michael had intimated in 1956 with respect to a completely unconnected matter that he would abide by his mother's wishes and that Michael and James had attended prior to March 1960 Dorsey's conferences with Mrs. Grey in regard to the proposed partition of properties held in common by Mrs. Grey with the O'Connor and Morgan Trusts, proves nothing, since Michael did not become of age until March 7, 1960, II R. 512, and since Dorsey's statement that he made his March 21, 1960 proposal of partition on behalf of Mrs. Grey, James and Michael is negated by that very proposal which was made solely on behalf of Mrs. Grey, VI R. 539-540 and by Dorsey's testimony that he "was acting solely for the interest of Mrs. Grey bearing in mind that [he has] had the advice of her two sons, as helpful as they could be in this partition". III R. 1229.

that she got taken care of in the best possible way, but *I can't say he represented me, because I didn't know at that time that I had the rights that I have.*

Q. Well, please, let's go back and read that sentence. A. Well, *I couldn't rely on anybody when I didn't know why—know what my rights were. I didn't even think about it—nobody ever told me about them, so how could I leave it to anybody.*

Q. Do you still say that you thought because he represented your mother, he represented you because you were members of the family? * * * A. I don't still say that—*what I say—and what I meant there was that at that time I didn't know that I had any rights.* It was entirely in my mother's hands what she did with her assets. Therefore, when she had an attorney, it was her business and I could only hope that he would take care of her matters. [Emphasis supplied.]

If, as James and Michael testified, they were wholly ignorant of their independent rights and interests in the trust property, and thought only that they might (or might not) someday inherit it from their mother, respondent's Tinker-to-Evers-to-Chance argument that Kelton was authorized to appear for them in the State Court case must fail, regardless of whatever else they knew or whatever part they took, or did not take, in the events leading to the partition and sale agreement. It is one thing for sons to appear to evince some interest in, and to appear to acquiesce in their mother's decisions regarding a transaction involving what they believe to be her property only, but it's quite another for the remaindermen of interests in property to authorize the life tenant to act for them. If, as we assume, Kelton did not know what the *fact* was in

that regard when he purported to appear for James and Michael, it must be recalled that he never spoke or corresponded with either of them. Pet. 30, 19a.

Respondent betrays its complete lack of confidence in its efforts to find some support for its position in the record herein by arguing, Brin Br., pp. 7-8, that James and Michael were not necessary parties to the State court action or that their "interests were virtually represented by their mother, Mrs. Grey". Indeed, par. 4.01 of the Partition and Sale Agreement expressly provided that it was "subject to the condition that a judgment be entered . . : in a proceeding in which . . . the remaindermen, individually and as representatives of the class consisting of the issue of Mrs. Grey are parties . . .", I R. 114, and par. 4.05 thereof that if any condition, including the one quoted above, was not complied with by December 31, 1960, the agreement would become null and void, I R. 116.

Moreover, respondent quotes out of context par. C of article 7425 (b)—24 Tex. Civ. St. by carefully omitting the sentence immediately preceding: "If the action is predicated upon any act or obligation of any beneficiary, such beneficiary shall be a necessary party to the proceedings." Pet. 32a-33a, which clearly limits the meaning of the sentence quoted by respondent, the first words of which are: "the only necessary parties to *such actions* . . .", to [redacted] actions "predicated upon any act or obligation of any beneficiary." It is obvious, therefore, that the sentence quoted by respondent, Brin Br., p. 7, is completely unrelated to a proceeding under par. E of 7425(b)—24, Tex. Civ. St., Pet. 33a, to relieve a trustee from prohibition of self-dealing. The term "beneficiary" as used in par. E of said section is clearly taken in its general meaning defined by Article 7425(b)—4 (J) as: "Any person entitled to re-

ceive from a trust any benefit of whatever kind or nature", which includes any remaindermen.[9].

VI.

Unable to challenge Petitioners' demonstration that the special verdict of the jury on the issue of damages and of market value of the A'Mell Building was predetermined by the District Court's instruction as to the binding effect of the State court judgment, Pet. 20, respondent argues that such verdict is supported by the appraisals made by Mr. Dunham and by the Dallas Real Estate Board. Brin Br., p. 20. Respondent however carefully fails to mention that Mr. Dunham's appraisal was made in June 1955, VI R. 293, 304, more than five years prior to the sale involved here and that the Dallas Real Estate Board's appraisal made on October 9, 1959, VI R. 545 at $500,000, i.e. $28.57 per square foot, had no relationship whatsoever to the value of the properties in Block 60 in September 1960, for the respondent's own estimate of some of the properties therein in February 1960 was at an average of $100 per square foot, V R. 135 and respondent's own schedule of prices paid for the other properties in the same block showed a high of $93.33 per square foot and a low of $48 per square foot. Significantly, respondent's President Mr. Stewart admitted at the trial that some of the properties in the block had been acquired at "bargain" prices, II R. 611.

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[9] Under Texas laws, a trustee owes the same fiduciary duty to life tenants and to vested and contingent remaindermen, *Brown* v. *Scherck*, 393 S. W. 2d 172, 181 (Tex. Civ. App.).

Similarly untenable is respondent's argument, Brin Br., p. 8, of virtual representation of James and Michael by Mrs. Grey, for it is elementary that the act or consent of one trust beneficiary is never binding upon another beneficiary and that a life tenant cannot act for and bind a remainderman. *Bogert,* Trust and Trustees (2nd Ed.) §941, pp. 391-392; *3 Scott on Trusts* (3rd Ed.) 216.2, pp. 1736-1738.

Thus, respondent's references to obsolete appraisals serve only to confirm that, but for the disputed instruction of the District Court, the jury could not have found any basis in the record for its special verdict.

Respondent displays a similar disregard of the most fundamental principles of the law of trusts in stating that the payment of brokerage commissions to Majors on the sale of Republic Garage Building, allegedly Majors' own property, did not have to be revealed to petitioners because "there was no representation that there had been no commission" Brin's Br., pp. 20-21.

Majors himself testified that he had never heard of a seller receiving a brokerage commission in selling his own property, IV R. 1680.

Respondent also disregards the record in arguing, Brin Br., p. 21, that "the only claimed relevance" of the payment of commission and the forgiveness of additional interest on Majors' defaulted note after maturity "was that Mrs. Grey wanted to get more for the A'Mell Building than the Bank paid for the Republic Garage Building." Respondent conveniently overlooks its admission that it had knowledge that the sales price for the A'Mell Building was computed for the 10,000 interior square feet thereof at the price of $59.64 per square foot represented by respondent to be paid to Majors for Republic Garage Building, with a bonus of 25% for the corner portion of the A'Mell Building, III R. 1465-6; 1019-20.

No one could seriously contend that comparison of prices for properties in the same block may be made regardless of their respective size. A'Mell Building contained 17,500 square feet, while Republic Garage Building contained only 10,900 square feet. I R. 138.

Respondent fails to mention that it had expressly acknowledged that in determining the price for the A'Mell Building, Mrs. Grey had relied on the truthfulness and correctness of respondent's schedule of prices submitted by it to Mrs. Grey, I R. 139-140. Obviously, the payment to Majors of a commission on the sale of his own property and other advantages granted to Majors were certainly relevant to the question of truthfulness and correctness of respondent's schedule of prices.

CONCLUSION

Respondent's sixty-six pages of opposition in its several capacities, like the manner in which it laid the State Court action,[10] would obscure the issues, and what they involve.

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[10] In the State Court action, respondent named itself, in its private capacity, as plaintiff, Mrs. Grey, James, Michael and itself as trustee of the James Charles O'Connor trust, itself as trustee of the Ivor O'Connor Morgan trust, and the Texas Attorney General, as defendants. I R. 124, 125. Kelton appeared for Mrs. Grey, James, Michael and respondent as trustee of the O'Connor trust. Other attorneys appeared for respondent in its other capacities. Obviously, when a trustee wishes itself to purchase property from its trust, the "controversy" is between the trustee, as such, and the trust beneficiaries, and not between them and their trustee in its "private" capacity, which is necessarily a stranger to them. Thus, respondent's arrangement of the parties obscured the conflict between it as trustee of the O'Connor trust and Mrs. Grey, James and Michael, inherent in the situation. It is noteworthy that in this action (in which the parties were necessarily the same as in the State Court action) the District Judge charged the jury, I R. 292, that one of the issues in the case was "Whether the First National Bank *in its individual capacity* misrepresented or concealed material facts", etc. [Emphasis supplied.] However, as the beneficiary of the O'Connor trust, Mrs. Grey dealt with respondent in its fiduciary capacity as trustee of the O'Connor trust, and not with respondent in its "individual capacity", as some outside third-party.

her failure to respond to the jury's inquiry;

The revealing remarks of the trial judge, the attempt to suppress them, the peculiar nature of her charge, in conflict with both *Callen* and the standard set up by Rule 49(a), the adequacy of Kelton's appearance in the State Court action to satisfy the requirements of due process, and the affirmance by the Court below, point to the conclusion that the petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Petitioner's Brief in the Court Below, pp. 5-6.

Trial Court Prejudged the Case

Actually, the equitable claims of our complaint were summarily dismissed from the cause by the court at the first pretrial hearing of May 8, 1964, before she had even read any depositions (IV R. 1809) and long prior to offer of any proof at the trial, which did not commence until February 8, 1965.

Proceedings of that pretrial conference were transcribed by the official court reporter and as filed by her, over her certification, are printed in IV R. 1789-1818. Not all of the court's remarks on the matter of equitable claims were reported in the certified transcript of that May 8 hearing, a statement of the court indicating she had prejudged the case having been omitted. The certified version does reveal (IV R. 1809) that at the hearing the court not only indicated she was not "too impressed with the plaintiffs' causes of action" (which had been set forth in five counts in a typed complaint comprising 55 legal-size pages), but further indicated that it was "inconceivable" to her that she would grant any of the equitable relief sought, irrespective of what the evidence was.

Thus was dismissed from the case before trial any claim for equitable relief. The court's prejudgment effectually left in the complaint only Count Three seeking damages, and in remarks edited from the certified transcription of that May 8 hearing (but now contained in the printed record as a result of motion, as later detailed) the court indicated she looked with equal disfavor on Mrs. Grey's recovering any money in this action:

"She doesn't want the property back, she just wants some money. I don't know what she wants with any more money. She's got all she can possibly use."

Appellants' counsel immediately made inquiry of the court as to the source of her information prompting her prejudicial prejudgment that Mrs. Grey needed no more money. The only reply came from an attorney[4] for the Bank:

"Well, I'll confirm it." (I R. 33, line 5).

It was not until after an extensive motion was filed below by appellants in the fall of 1965 seeking correction of the record (including specifically the certified transcription of the May 8, 1964, hearing) and a hearing had on such motion that the court reporter released to counsel for appellants two typed pages (photostatic copies of which appear at I R. 32 and 33) containing the above-quoted language of court and counsel as to Mrs. Grey already having all the money she needed, which prejudicial remarks had theretofore been edited from the certified transcript.

Mrs. Grey's financial status was never in issue and, of course, should have had no proper place in determination of the merits of the complaint.

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[4] The same one who later was allowed by the trial judge a fee of $50,000., to be paid out of appellants' trust funds for "defending" their trust in this suit.

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IN THE

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OCTOBER TERM, 1968

No. 513

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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Subsequent to the filing of petitioners' reply brief herein, this Court on November 18, 1968, decided *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, No. 14, Oct. T. 1968, 37 LW 4037, which provides additional support for petitioners' contention that the judgment of the Texas state court was void or voidable because of the failure of the attorney who purported to represent both the respondent in its capacity as trustee, and the petitioners as the life beneficiary and remain-

dermen of the trust, to disclose to petitioners that he was so appearing, and to advise them of the inherent conflict of interest that that involved. Pet. 8, 18, 31-33; Pet. Rep. Br. 16-18, 26, fn. 10. In *Commonwealth,* the question was the validity of a unanimous arbitral award by a panel of three arbitrators, where the arbitrator chosen by the arbitrators designated by the parties failed to disclose that in the past he had had business relationship with one of the parties. This Court held that the arbitrator's failure to make such disclosure sufficed in itself to vitiate the award, even though there was no charge of any actual bias or prejudice.

The principle underlying *Commonwealth* is no less applicable here. In the state court action the question was whether the purchase by the respondent of certain assets of a trust of which it was trustee, and the petitioners were the life tenant and remaindermen, should be approved. Clearly, due process requires that in such an action, the beneficiaries of the trust be represented by an attorney wholly independent of the trustee, particularly, where as here, the jurisdiction of the court over the beneficiaries is based solely on the appearance filed in their behalf by the attorney.

The petition should be granted.

Respectfully submitted,

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